No. 16-1363	
Title:	**Kirstjen M. Nielsen, Secretary of Homeland Security, et al., Petitioners** **v.** **Mony Preap, et al.**
Docketed:	May 11, 2017
Linked with 16A944	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(14-16326, 14-16779)
Decision Date:	August 4, 2016 Rule 12.4
Rehearing Denied:	January 11, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 31 2017	Application (16A944) to extend the time to file a petition for a writ of certiorari from April 11, 2017 to May 11, 2017, submitted to Justice Kennedy.
Apr 07 2017	Application (16A944) granted by Justice Kennedy extending the time to file until May 11, 2017.
May 11 2017	Petition for a writ of certiorari filed. (Response due June 12, 2017)
May 18 2017	Order extending time to file response to petition to and including July 12, 2017, for all respondents.
Jun 26 2017	Order further extending time to file response to petition to and including August 11, 2017.
Aug 08 2017	Brief of respondents Mony Preap, et al. in opposition filed.
Aug 23 2017	DISTRIBUTED for Conference of 9/25/2017.
Aug 23 2017	Reply of petitioners Elaine C. Duke, Acting Secretary of Homeland Security, et al. filed. (Distributed)
Feb 27 2018	DISTRIBUTED for Conference of 3/2/2018.

Mar 12 2018	DISTRIBUTED for Conference of 3/16/2018.
Mar 19 2018	Petition GRANTED.
Apr 10 2018	As Rule 34.6 provides, "If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to [applicable] redaction rules." Subsequent party and amicus filings in the case should now be submitted through the Court's electronic filing system, with any necessary redactions.
Apr 10 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 1, 2018. The time to file respondents' brief on the merits is extended to and including August 6, 2018. The reply brief is to be filed pursuant to Rule 25.3.
Apr 10 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
May 11 2018	Motion to dispense with printing the joint appendix filed by petitioners Kirstjen M. Nielsen, Secretary of Homeland Security, et al. **Proof of Service** **Main Document**
May 29 2018	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jun 01 2018	Brief of petitioners Kirstjen M. Nielsen, Secretary of Homeland Security, et al. filed. **Certificate of Word Count** **Main Document**
Jun 08 2018	Brief amicus curiae of Immigration Reform Law Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 08 2018	Brief amicus curiae of Criminal Justice Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 08 2018	Brief amicus curiae of U.S. Rep. Andy Biggs, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	SET FOR ARGUMENT On Wednesday, October 10, 2018
Aug 03 2018	CIRCULATED

Aug 06 2018	Brief of respondents Mony Preap, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 07 2018	Record requested from the U.S.C.A. 9th Circuit.
Aug 10 2018	Brief amicus curiae of National Immigrant Justice Center filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Brief amici curiae of Former INS and DHS General Counsels filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Brief amici curiae of Advancement Project, et al. filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Brief amici curiae of Constitutional and Immigration Law Professors filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Brief amici curiae of Administrative and Immigration Law Professors filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Brief amici curiae of Members of Congress filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Aug 30 2018	Record from the U.S.C.A. 9th Circuit is electronic and located on PACER.
Aug 30 2018	Record from the U.S.D.C. California Northern District (Oakland) is electronic and located on PACER, with the exception of Restricted documents that's electronic.
Sep 05 2018	Reply of petitioners Kirstjen M. Nielsen, Secretary of Homeland Security, et al. filed. (Distributed) **Proof of Service** **Main Document**
Oct 10 2018	Argued. For petitioners: Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Cecillia D. Wang, New York, N. Y.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice	202-514-2217

950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

SupremeCtBriefs@USDOJ.gov

Party name: Kirstjen M. Nielsen, Secretary of Homeland Security, et al.

Attorneys for Respondents

Michael King Thomas Tan Counsel of Record	American Civil Liberties Union Foundation 125 Broad St., 18th Floor New York, NY 10004 mtan@aclu.org	212-549-2500

Party name: Mony Preap, et al.

Other

Alina Das Counsel of Record	Washington Square Legal Services 245 Sullivan Street 5th Floor New York, NY 10012 alina.das@nyu.edu	212-998-6430

Party name: Advancement Project et al.

Mark Christopher Fleming Counsel of Record	WilmerHale 60 State Street Boston, MA 02109 mark.fleming@wilmerhale.com	(617) 526-6000

Party name: Constitutional and Immigration Law Professors

Elaine Janet Goldenberg Counsel of Record	Munger, Tolles & Olson LLP 1155 F Street, NW 7th Floor Washington, DC 20004 elaine.goldenberg@mto.com	202-220-1114

Party name: National Immigrant Justice Center

Christopher J. Hajec Counsel of Record	Immigration Reform Law Institute 25 Massachusetts Avenue NW, Suite 335 Washington, DC 20001 chajec@irli.org	202-232-5590

Party name: Immigration Reform Law Institute

Anton Metlitsky Counsel of Record	O'Melveny & Myers, LLP Times Square Tower, 7 Times Square New York, NY 10036 ametlitsky@omm.com	212-326-2000

Party name: Administrative And Immigration Law Professors

Matthew Eben Price	Jenner & Block, LLP	202-639-6873

Counsel of Record	1099 New York Ave. NW, Suite 900 Washington, DC 20001 MPrice@jenner.com	
Party name: Former INS and DHS General Counsels		
Richard A. Samp Counsel of Record	Washington Legal Foundation 2009 Massachusetts Ave., N.W. Washington, DC 20036-0000 rsamp@wlf.org	202-588-0302
Party name: U.S. Rep. Andy Biggs, et al.		
Kent Stephen Scheidegger Counsel of Record	Criminal Justice Legal Fdtn. 2131 L Street Sacramento, CA 95816 Kent.Scheidegger@cjlf.org	916-446-0345
Party name: Criminal Justice Legal Foundation		
Jayashri Srikantiah Counsel of Record	Stanford Law School Immigrants' Rights Clinic 559 Nathan Abbott Way Stanford, CA 94305 jsrikantiah@law.stanford.edu	6507242442
Party name: Members of Congress		
Ward Alexander Penfold	O'Melveny & Myers LLP Two Embarcadero Center, 28th Floor San Francisco, CA 94111 wpenfold@omm.com	4159848700
Party name: Members of Congress		

RECORDS AND BRIEFS

16-1363

Supreme Court, U.S.
FILED
MAY 11 2017
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JOHN F. KELLY, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ZACHARY D. TRIPP
Assistant to the Solicitor General
HANS H. CHEN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

PARTIES TO THE PROCEEDING

Petitioners in *Preap* were appellants in the court of appeals. They are John F. Kelly, in his official capacity as Secretary of Homeland Security; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; David W. Jennings, in his official capacity as U.S. Immigration and Customs Enforcement (ICE) San Francisco Field Office Director; Gregory J. Archambeault, in his official capacity as ICE San Diego Field Office Director; and David A. Marin, in his official capacity as ICE Acting Los Angeles Field Office Director.

Petitioners in *Khoury* were appellants in the court of appeals. They are Bryan Wilcox, in his official capacity as Acting ICE Field Office Director; Lowell Clark, in his official capacity as Warden of the Northwest Detention Center; Juan P. Osuna, in his official capacity as Director of the Executive Office of Immigration Review; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States; John F. Kelly, in his official capacity as Secretary of Homeland Security; Thomas D. Homan, in his official capacity as Acting Director, ICE; and the United States of America.*

Respondents in *Preap* were appellees in the court of appeals. They are Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno, for themselves and on behalf of a class of similarly situated individuals.

---

* In both cases, John F. Kelly and Jefferson B. Sessions III are automatically substituted for their respective predecessors. See Sup. Ct. R. 35.3. In *Preap*, David W. Jennings is substituted for his predecessor, and in *Khoury*, Bryan Wilcox and Thomas D. Homan are substituted for their predecessors. See *ibid.*

Respondents in *Khoury* were appellees in the court of appeals. They are Bassam Yusuf Khoury, Alvin Rodriguez Moya, and Pablo Carrera Zavala, for themselves and on behalf of a class of similarly situated individuals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory and regulatory provisions involved 2
Statement 2
A. Legal framework 2
B. Facts and procedural history 5
Reasons for granting the petition 7
I. The court of appeals' decisions are wrong 9
II. The court of appeals' decisions create a circuit conflict on an important and recurring issue of federal law 13
Conclusion 17
Appendix A — Court of appeals opinion in *Preap* (Aug. 4, 2016) 1a
Appendix B — Court of appeals opinion in *Khoury* (Aug. 4, 2016) 58a
Appendix C — District court order in *Preap* (May 15, 2014) 60a
Appendix D — District court order in *Khoury* (Mar. 11, 2014) 107a
Appendix E — Court of appeals order denying rehearing en banc in *Preap* (Jan. 11, 2017) 139a
Appendix F — Court of appeals order denying rehearing en banc in *Khoury* (Jan. 11, 2017) 140a
Appendix G — Statutory and regulatory provisions 141a

TABLE OF AUTHORITIES

Cases: Page

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 6, 11
Castañeda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 6, 15
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 8
Demore v. *Kim*, 538 U.S. 510 (2003) 2, 11, 16
Gordon v. *Lynch*, 842 F.3d 66 (1st Cir. 2016) 15
Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 6, 7, 10, 14
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), petition for cert. pending, No. 15-1205 (Mar. 25, 2016), and cert. denied, 136 S. Ct. 2494 (2016) (No. 15-1307) 6, 12, 13, 14
Olmos v. *Holder*, 780 F.3d 1313 (10th Cir. 2015) 6, 10, 14
Rojas, In re, 23 I. & N. Dec. 117 (B.I.A. 2001) 4, 5, 8, 9, 11, 12
Sylvain v. *Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) 6, 7, 12, 13, 14
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 6, 11, 12
United States v. *Willings & Francis*, 8 U.S. (4 Cranch) 48 (1807) 9

Statutes, regulations, and rules:

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. F, Tit. II, 129 Stat. 2497 15
Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 16

Statutes, regulations, and rules—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 3
8 U.S.C. 1103(a)(1) 3
8 U.S.C. 1182(a)(2) 3
8 U.S.C. 1182(a)(3)(B) 3
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) 3, 6, 9, 142a
8 U.S.C. 1226(c)(1)(A)-(D) 8, 142a
8 U.S.C. 1226(c)(2) 4, 5, 6, 8, 142a
8 U.S.C. 1227(a)(2)(A)(i) 3
8 U.S.C. 1227(a)(2)(A)(ii) 3
8 U.S.C. 1227(a)(2)(A)(iii) 3
8 U.S.C. 1227(a)(2)(B) 3
8 U.S.C. 1227(a)(2)(C) 3
8 U.S.C. 1227(a)(2)(D) 3
8 U.S.C. 1227(a)(4)(B) 3
6 U.S.C. 202(3) 3
6 U.S.C. 557 3
8 C.F.R.:
Section 287.7(a) 13
Section 287.7(d) 13
Sup. Ct. R. 12.4 1

Miscellaneous:

U.S. Immigration & Customs Enforcement, *ICE Enforcement and Removal Operations Report Fiscal Year 2016*, https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf 13
Webster's Third New International Dictionary (1993) 9

In the Supreme Court of the United States

No.

JOHN F. KELLY, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. They raise the identical question. Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals in *Preap* (App., *infra*, 1a-57a) is reported (without the appendices) at 831 F.3d 1193. The opinion of the court of appeals in *Khoury* (App., *infra*, 58a-59a) is not published in the *Federal Reporter* but is reprinted at 667 Fed. Appx.

966. The opinion of the district court in *Preap* (App., *infra*, 60a-106a) is reported at 303 F.R.D. 566. The opinion of the district court in *Khoury* (App., *infra*, 107a-138a) is reported at 3 F. Supp. 3d 877.

JURISDICTION

In both *Preap* and *Khoury*, the judgment of the court of appeals was entered on August 4, 2016, and a petition for rehearing was denied on January 11, 2017 (App., *infra*, 139a-140a). On April 7, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 141a-146a.

STATEMENT

These cases present the question whether a criminal alien in removal proceedings becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after he is released from criminal custody, the Department of Homeland Security (DHS) does not take him into immigration custody immediately.

A. Legal Framework

1. In 8 U.S.C. 1226(c), Congress mandated that DHS detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. The first directs the Secretary of Homeland Security to take into custody certain criminal and terrorist aliens:

> The [Secretary[1]] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in [8 U.S.C. 1182(a)(2)],
>
> (B) is deportable by reason of having committed any offense covered in [8 U.S.C. 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],
>
> (C) is deportable under [8 U.S.C. 1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under [8 U.S.C. 1182(a)(3)(B)] or deportable under [8 U.S.C. 1227(a)(4)(B)],
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. 1226(c)(1). The referenced sections render aliens deportable or inadmissible because of certain criminal offenses or terrorist acts. The two class actions that are included in this petition take it as a given that class members are removable under those provisions.

Paragraph (2) is entitled "Release," and it provides that the Secretary "may release an alien described in

---

[1] Congress has transferred to the Secretary the enforcement of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* *E.g.*, 6 U.S.C. 202(3), 557; 8 U.S.C. 1103(a)(1).

paragraph (1) only if" a narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). The class actions here take it as a given that this exception does not apply. Respondents are therefore subject to mandatory detention, without bond, if each is an "alien described in paragraph (1)" of Section 1226(c). *Ibid.*

2. The Board of Immigration Appeals (BIA) has interpreted the phrase an "alien described in paragraph (1)," concluding that an alien fits within the meaning of that phrase if he is deportable or inadmissible under any of the four lettered subparagraphs. *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). Under the BIA's interpretation, the flush paragraph beginning "when the alien is released" does not "describe[]" an alien, but rather identifies when the Secretary's duty is triggered, and thus does not limit paragraph (2)'s prohibition against release during removal proceedings. *Ibid.* Specifically, the BIA held in *Rojas* that an alien who has been convicted of a predicate offense does not become exempt from the detention mandate if he "is not immediately taken into custody by [DHS]." *Ibid.* The BIA explained that the phrase "an alien described in paragraph (1)" is ambiguous, as it does not state "whether it encompasses the 'when the alien is released' clause," or "merely references the four categories of aliens described in subparagraphs (A) through (D)." *Id.* at 120. After reviewing the statute's text, context, and history, as well as practical considerations, the BIA concluded that it would be "inconsistent with our understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension

by [DHS]." *Id.* at 124. The BIA instead concluded that the "when the alien is released" clause defines when DHS's duty to take a criminal alien into custody is triggered. *Ibid.*

B. Facts And Procedural History

1. *The* Preap *case.* On December 12, 2013, the *Preap* respondents brought a putative class action in the United States District Court for the Northern District of California. The court certified a class consisting of all aliens in California "who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." App., *infra*, 8a. The *Preap* respondents contended that they were exempt from mandatory detention under Section 1226(c), notwithstanding that they had committed a specified predicate offense, on the theory that Section 1226(c)(2)'s detention mandate does not apply unless DHS takes the alien into custody "when the alien is released." *Id.* at 3a-4a.

On May 15, 2014, the district court entered a preliminary injunction in favor of the *Preap* respondents. App., *infra*, 60a-106a. The court agreed with the *Preap* respondents' interpretation of Section 1226(c), held that the class members were exempt from mandatory detention because they had not been taken into immigration custody "immediately," and it entered a preliminary injunction requiring the government to provide bond hearings to all class members. *Id.* at 61a, 95a, 105a-106a.

The court of appeals affirmed. App., *infra*, 1a-57a. The court recognized that four of its sister circuits had considered the issue and "sided with the government" by ruling that a gap in custody is irrelevant. *Id.* at 4a;

see *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015);[2] *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly on the question whether a criminal alien becomes exempt after a multiple-year delay). The court nonetheless rejected that position and declined to accord deference to the BIA's decision in *Rojas*. Instead, the court held that the "when the alien is released" clause in Section 1226(c)(1) unambiguously exempts a criminal alien from mandatory detention unless he is taken into custody "promptly" upon his release. App., *infra*, 3a. The court also rejected the government's argument under *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003), and *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-720 (1990), that, even if the "when the alien is released" clause mandates action by DHS within a specified time, the government's failure to take the alien into custody until later does not preclude it from relying on the bar to release in Section 1226(c)(2). App., *infra*, 23a-27a; but see

---

[2] The government filed a petition for a writ of certiorari in *Lora* on the question whether a criminal alien becomes exempt from mandatory detention under Section 1226(c) if his removal proceedings last six months. See Pet. i, No. 15-1205 (Mar. 25, 2016). The government suggested that the petition be held pending this Court's decision in *Jennings* v. *Rodriguez*, No. 15-1204 (argued Nov. 30, 2016), and the government's petition in *Lora* remains pending. The Court denied a conditional cross-petition in *Lora* presenting the question here: whether a criminal alien is exempt from mandatory detention if DHS does not take him into immigration custody immediately upon his release from criminal custody. See 136 S. Ct. 2494 (2016) (No. 15-1307). At that time, no circuit conflict existed.

Sylvain, 714 F.3d at 160-161 (accepting this argument); *Hosh*, 680 F.3d at 382 (same).

2. *The* Khoury *case*. On August 1, 2013, the *Khoury* respondents brought a putative class action in the United States District Court for the Western District of Washington, raising the same argument that criminal aliens become exempt from detention under Section 1226(c) if DHS does not take them into custody immediately. The court certified a class consisting of all aliens in the Western District "who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody." App., *infra*, 58a-59a. And the court granted summary judgment to the respondents, declaring that Section 1226(c) "applies only to aliens who are detained immediately upon their release from criminal custody." *Id.* at 59a.

The government appealed, and the court of appeals affirmed. App., *infra*, 58a-59a. The court relied on its decision in *Preap*, issued the same day. *Ibid.*

3. The government filed petitions for rehearing en banc in both *Preap* and *Khoury*, which the court of appeals denied. App., *infra*, 139a-140a.

REASONS FOR GRANTING THE PETITION

This Court should grant the government's petition for a writ of certiorari because the Ninth Circuit has created a circuit conflict on an important and recurring issue of federal law: whether a criminal alien becomes exempt from mandatory detention under Section 1226(c) if DHS does not take him into immigration custody immediately when he is released from criminal custody. As the Ninth Circuit itself acknowledged, App.,

infra, 4a, four courts of appeals have held that the answer is no; the Ninth Circuit is the only court of appeals to hold that the answer is yes.

The Ninth Circuit's decision not only created a lopsided circuit conflict, but it also is wrong. Paragraph (2) of Section 1226(c) prohibits the Secretary from releasing any "alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). And paragraph (1) describes aliens based on their criminal history: It provides that the Secretary must take into custody "any alien who" is inadmissible or deportable because of certain criminal offenses or terrorist conduct. 8 U.S.C. 1226(c)(1)(A)-(D). Therefore, "any alien who" is removable because of a predicate offense is subject to mandatory detention. The further phrase "when the alien is released" in paragraph (1) simply identifies when the Secretary's duty to take the alien into custody is triggered. At most, Section 1226(c) is ambiguous in this respect, and the BIA has held that a gap between criminal and immigration custody is irrelevant. See *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). That decision warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and is correct even without it.

The question presented has considerable practical importance. Under the Ninth Circuit's rule, many criminal aliens will become exempt from mandatory custody for a reason—a gap in custody—that is "irrelevant for all other immigration purposes" and often outside DHS's control. See *Rojas*, 23 I. & N. Dec. at 122. Moreover, some significant portion of criminal aliens who obtain bond hearings will be released on bond then will flee or reoffend, thereby causing precisely the problems

Congress enacted Section 1226(c) to prevent. This Court should grant certiorari and reverse.

I. The Court Of Appeals' Decisions Are Wrong

The BIA's interpretation of Section 1226(c) in *Rojas* warrants *Chevron* deference, and is correct even without it. First, as the BIA concluded, the phrase "an alien described in paragraph (1)" is most naturally read to refer "to an alien described by one of four subparagraphs, (A) through (D)." 23 I. & N. Dec. at 121. Those subparagraphs describe characteristics of the alien based on *the alien's own conduct* that sensibly warrant mandatory detention during removal proceedings: his commission of a qualifying criminal offense or terrorist act. And as a matter of grammar, those subparagraphs naturally describe who such an alien is: "any alien who * * * is inadmissible" or "who * * * is deportable" for one of the enumerated reasons. 8 U.S.C. 1226(c)(1). By contrast, the phrase that follows—"when the alien is released"—takes as a given that "the alien" has already been described. *Ibid.* That clause instead thus defines when an *action of the Secretary* should occur, and paragraph (1) provides what that action is: The Secretary "shall take into custody" such an alien "when the alien is released." *Ibid.*[3] Accordingly, DHS has an obligation

---

[3] Paragraph (1) is also ambiguous with respect to whether "when the alien is released" means "at or around the same time," or "in the event that." See *Webster's Third New International Dictionary* 2602 (1993) (defining "when" as "at or during the time that," "just after the moment that," "at any and every time that," and "in the event that"); see also *United States* v. *Willings & Francis*, 8 U.S. (4 Cranch) 48, 55 (1807) (Marshall, C.J.) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law

under paragraph (1) to take a covered criminal alien into custody "when the alien is released," and under paragraph (2) must in any event detain a covered criminal alien during his removal proceedings without regard to whether custody began immediately.

A practical example illustrates the structural point. If somebody gave you a two-paragraph shopping list saying "(1) Pick up milk, eggs, and cheese when the groceries are available for sale at the store"; and "(2) refrigerate the groceries described in paragraph (1)," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store opened, you could leave them out on the counter rather than put them in the refrigerator. Here, Congress's use of lettered subparagraphs to enumerate which criminals and terrorists the Secretary should take into custody makes the statute somewhat more dense, but it does not alter this basic structural point. And although Congress could have referred to aliens "described in subparagraphs (A) through (D) of paragraph (1)" instead of aliens "described in paragraph (1)," "Congress has not always been consistent in how it refers to other subsections in the same statute." *Olmos* v. *Holder*, 780 F.3d 1313, 1320 (10th Cir. 2015). "For example, in 8 U.S.C. § 1153(b)(5)(B)(i), Congress referred broadly to 'subparagraph (A)' even though the context showed that Congress was referring to only two subparts of 'subparagraph (A)': (i) and (ii)." *Ibid.*

Second, interpreting "when the alien is released" as triggering DHS's duty to take a qualifying alien into immigration custody, rather than circumscribing the class

---

under consideration."); *Hosh* v. *Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012) (finding "when" in Section 1226(c) to be ambiguous).

of qualifying aliens, is consistent with the statutory context and purpose. Congress enacted Section 1226(c)'s mandate of detention "against a backdrop of wholesale failure by the [government] to deal with increasing rates of criminal activity by aliens," and to ensure that aliens would appear at their removal proceedings and that the government would be able to remove them once a final removal order was entered. *Demore* v. *Kim*, 538 U.S. 510, 513, 518-520 (2003) (discussing evidence of recidivism and flight among criminal aliens). "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122. Many provisions of the immigration laws in turn are "aimed at expediting the removal of aliens, and that is especially true for criminal aliens such as those who fall within subparagraphs (A) through (D)." *Id.* at 121. By contrast, the Ninth Circuit's reading of Section 1226(c) would undermine Congress's overarching purpose by exempting serious criminals from mandatory detention, and it would do so based on a factor—whether there is a gap in custody—that "is irrelevant for all other immigration purposes." *Id.* at 122.

Third, the BIA's construction of Section 1226(c) as mandating detention without regard to a gap in custody is supported by this Court's precedent establishing that statutes providing that "the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003). For example, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), this Court held that, even if the government fails

to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance in court, the government may still detain that person before trial. *Id.* at 717-718. Otherwise, "every time some deviation from the strictures" of the statute occurs, it would "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Id.* at 720. So too here. The Ninth Circuit's interpretation "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous criminals." *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013).

"Finally, the BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute." *Lora* v. *Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015). "As the BIA explained in *Rojas*, '[i]t is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release.'" *Ibid.* (brackets in original) (quoting *Rojas*, 23 I. &. N. Dec. at 128). "Particularly for criminal aliens in state custody," the Second Circuit has explained, "it is unrealistic to assume that DHS will be aware of the exact timing of an alien's release from custody, nor does it have the resources to appear at every location where a qualifying alien is being released." *Id.* at 612-613.

Indeed, gaps in custody are often caused by reasons outside DHS's control. To facilitate its efforts to take criminal aliens into custody, U.S. Immigration and Customs Enforcement (ICE) often sends requests to state or local jurisdictions to notify it in advance when a particular criminal alien will be released from custody, and often sends requests that the custodian hold the alien in custody for up to 48 hours to enable ICE officers to effectuate an arrest. See 8 C.F.R. 287.7(a) and (d). State and local jurisdictions do not always cooperate with those requests, however. For example, ICE reported in fiscal year 2016 that its enforcement and removal officers "documented a total of 21,205 declined detainers in 567 counties in 48 states including the District of Columbia between January 1, 2014, and September 30, 2016." *ICE Enforcement and Removal Operations Report Fiscal Year 2016*, at 9. "Declined detainers result in convicted criminals being released back into U.S. communities," thus creating gaps in custody "notwithstanding ICE's requests for transfer of those individuals." *Ibid.* The Ninth Circuit's interpretation thus would frustrate DHS's ability to remove deportable criminal aliens from the United States, in contravention of Congress's basic purpose.

II. The Court Of Appeals' Decisions Create A Circuit Conflict On An Important And Recurring Issue Of Federal Law

1. The Ninth Circuit's decisions in these cases create a conflict with the decisions of every other circuit to decide the same question. As the Ninth Circuit recognized, the Second, Third, Fourth, and Tenth Circuits have held that a criminal alien does not become exempt from mandatory detention when there is a gap in custody, even when it lasts multiple years. App., *infra*, 4a; see *Lora*, 804 F.3d at 611; *Sylvain*, 714 F.3d at 161;

Hosh v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); *Olmos*, 780 F.3d at 1324-1327. The Ninth Circuit expressly rejected that position. It held that a criminal alien is exempted from mandatory detention if DHS does not take him into custody "promptly," and it affirmed class-action injunctions that exempt criminal aliens who DHS does not take into custody "immediately." App., *infra*, 6a, 28a, 59a. The Ninth Circuit thus opened an acknowledged conflict with the decisions of four circuits.

As the Ninth Circuit noted, its sister circuits adopted somewhat different rationales. See App., *infra*, 4a. Three circuits (the Second, Fourth, and Tenth) deferred to the BIA's interpretation of Section 1226(c) in *Rojas*. See *Lora*, 804 F.3d at 610-613; *Hosh*, 680 F.3d at 380-381; *Olmos*, 780 F.3d at 1316. As an additional or alternative rationale, all four circuits (the Second, Third, Fourth, and Tenth) relied on the *Montalvo-Murillo* line of cases to reason that, even if Section 1226(c) directs the government to act within a specified time, the criminal alien would not become exempt from mandatory detention if the government failed to act until later. See *Lora*, 804 F.3d at 612; *Sylvain*, 714 F.3d at 157-161; *Hosh*, 680 F.3d at 381-383; *Olmos*, 780 F.3d at 1325-1326. The Ninth Circuit, however, rejected both arguments: It declined to defer to the BIA's interpretation in *Rojas*, and it held that the *Montalvo-Murillo* line of cases was inapposite. App., *infra*, 12a-13a. And most fundamentally, the Ninth Circuit's bottom line is different from that of four other circuits.

The Ninth Circuit also denied the government's petitions for rehearing en banc in *Preap* and *Khoury*. App., *infra*, 139a-140a. The conflict therefore will persist absent this Court's review.

2. No other circuit court has adopted the Ninth Circuit's position. The Ninth Circuit found persuasive Judge Barron's opinion for three members of the First Circuit in *Castañeda* v. *Souza*, 810 F.3d 15 (2015) (en banc). See App., *infra*, 5a ("We agree with Judge Barron and his two colleagues."). But as the Ninth Circuit recognized, *id.* at 5a n.4, Judge Barron's views did not command a majority in *Castañeda*. Rather, the en banc First Circuit divided evenly. That case involved the question of whether a criminal alien becomes exempt from mandatory detention after a break in custody that lasted multiple years. Three judges concluded that a criminal alien becomes exempt if DHS does not take him into custody "within a reasonable time frame," and that a multiple-year delay was unreasonable, *Castañeda*, 810 F.3d at 38, 42 (opinion of Barron, J.). The remaining three judges concluded that the gap was irrelevant to the custody mandate. See *id.* at 47, 58 (opinion of Kayatta, J.). The First Circuit accordingly does not have binding circuit precedent as to whether a criminal alien becomes exempt after a multiple-year gap.[4]

3. The question presented here not only divides the circuits, but also has considerable practical importance. Removing deportable criminal aliens has long been a top priority of immigration enforcement. *E.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. F, Tit. II, 129 Stat. 2497 (prioritizing the identification and removal of criminal aliens by the severity of their

---

[4] The First Circuit has definitively rejected, however, a bright-line rule that a criminal alien becomes exempt when there is a gap in custody of a mere 48 hours. See *Gordon* v. *Lynch*, 842 F.3d 66, 70 (2016) ("[A] class-wide, bright line rule of a mere 48 hours, with no mention of an alien's potential culpability for delay, is inconsistent with the reasoning and logic of both *Castañeda* opinions.").

crimes); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 (same). The Ninth Circuit's decisions will impede DHS's efforts to remove criminal aliens, and lead to the very problems that Congress enacted Section 1226(c) to prevent. Congress enacted Section 1226(c) to deny certain deportable criminal aliens the opportunity for release on bond during their removal proceedings, based on real-world experience that, when such aliens were given bond hearings, they were too often released and "continue[d] to engage in crime and fail[ed] to appear for their removal hearings in large numbers." *Demore*, 538 U.S. at 513; see *id.* at 518-520 (discussing evidence of flight and recidivism). The Ninth Circuit's interpretation, however, ensures that many criminal aliens who committed predicate offenses nonetheless will be given bond hearings, and a significant portion of those will be released, thus creating the very risk of recidivism and flight that Section 1226(c) would otherwise foreclose.

Furthermore, as a practical reality, gaps in custody are inevitable due to resource constraints and DHS's incomplete information regarding when particular criminal aliens will be released. See pp. 12-13, *supra*. Indeed, gaps in custody often occur notwithstanding DHS's efforts to request the needed information from the state or local custodian (or to request that the state or local jurisdiction temporarily hold the alien to enable DHS to effectuate an arrest). See *ibid.* The Ninth Circuit's interpretation thus will frustrate DHS's ability to remove deportable criminal aliens from the United States, and frustrate Congress's purpose of ensuring that removable criminal aliens are unable to flee or reoffend during their removal proceedings.

4. Finally, these cases provide an ideal vehicle because the question here is squarely presented in both. Indeed, in each case, it is the only question: A district court entered an injunction in a broad class action exempting criminal aliens from mandatory detention under Section 1226(c) on the basis that DHS did not take them into custody "immediately." App., *infra*, 8a, 58a-59a. And in each case, the court of appeals affirmed by holding that Section 1226(c) exempts criminal aliens from mandatory detention if DHS does not take them into immigration custody "promptly." *Id.* at 3a, 59a. Accordingly, if this Court were to hold that the timing of custody is irrelevant or that there is no immediacy or promptness exception, the court of appeals' decision would be reversed and the injunctions vacated.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ZACHARY D. TRIPP
Assistant to the Solicitor General
HANS H. CHEN
Attorney

MAY 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16326 and 14-16779
D.C. No. 4:13-cv-05754-YGR

MONY PREAP; EDUARDO VEGA PADILLA; JUAN LOZANO MAGDALENO, PLAINTIFFS-APPELLEES

v.

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; LORETTA E. LYNCH, ATTORNEY GENERAL; TIMOTHY S. AITKEN; GREGORY ARCHAMBEAULT; DAVID MARIN, DEFENDANTS-APPELLANTS

Argued and Submitted: July 8, 2015
Seattle, Washington
Filed: Aug. 4, 2016

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

OPINION

Before: ANDREW J. KLEINFELD, JACQUELINE H. NGUYEN, and MICHELLE T. FRIEDLAND, Circuit Judges.

NGUYEN, Circuit Judge:

Every day in the United States, the government holds over 30,000 aliens in prison-like conditions while determining whether they should be removed from the country.[1] Some are held because they were found, in a bond hearing, to pose a risk of flight or dangerousness. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d). Others, however, are held without bond because they have committed an offense enumerated in a provision of the Immigration and Naturalization Act ("INA"). 8 U.S.C. § 1226(c). Aliens in this latter group are subject to the INA's mandatory detention provision, which requires immigration authorities to detain them "when [they are] released" from criminal custody, 8 U.S.C. § 1226(c)(1), and to hold them without bond, 8 U.S.C. § 1226(c)(2). A broad range of crimes is covered under the mandatory detention provision, from serious felonies to misdemeanor offenses involving moral turpitude and simple possession of a controlled substance. 8 U.S.C. §§ 1226(c)(1)(A)-(D).

This mandatory detention provision has been challenged on various grounds. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the constitutionality of the provision against a due process challenge); *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-81 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom.*, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 1182403 (June 20, 2016) (holding that detainees are entitled to a bond

---

[1] U.S. Immigration and Customs Enforcement, ERO Facts and Statistics 3 (2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

hearing after spending six months in custody).[2] Here, we are faced with another such challenge; this time, regarding the meaning of the phrase "when [they are] released" in § 1226(c)(1), and whether it limits the category of aliens subject to detention without bond under § 1226(c)(2). Specifically, we must decide whether an alien *must* be detained without bond even if he has resettled into the community after release from criminal custody. If the answer is no, then the alien *may* still be detained, but he may seek release in a bond hearing under § 1226(a) by showing that he poses neither a risk of flight nor a danger to the community.

Addressing this issue requires us to consider the interaction of the two paragraphs of the mandatory detention provision, 8 U.S.C. § 1226(c). Paragraph (1) requires the Attorney General ("AG") to "take into custody any alien who [commits an offense enumerated in subparagraphs (A)-(D)] when the alien is released [from criminal custody]." 8 U.S.C. § 1226(c)(1). Paragraph (2) prohibits the release of "an alien described in paragraph (1)" except in limited circumstances concerning witness protection. 8 U.S.C. § 1226(c)(2). Plaintiffs argue that the phrase "when . . . released" in paragraph (1) applies to paragraph (2) as well, so that an alien must be held without bond only if taken into immigration custody promptly upon release from criminal custody for an enumerated offense. The government, by contrast, argues that "an alien described in paragraph (1)" is any alien who commits a crime listed in §§ 1226(c)(1)(A)-(D) regardless of how

---

[2] For a detailed history of decisions from the Supreme Court and this court dealing with the various immigration detention statutes, see *Rodriguez III*, 804 F.3d at 1067-70.

much time elapses between criminal custody and immigration custody. According to the government, individuals not detained "when . . . released" from criminal custody as required by paragraph (1) are still considered "alien[s] described in paragraph (1)" for purposes of the bar to bonded release in paragraph (2).

To date, five of our sister circuits have considered this issue, and four have sided with the government. Significantly, however, there is no consensus in the reasoning of these courts. The Second and Tenth Circuits found that the phrase "an alien described in paragraph (1)" was ambiguous, and thus deferred to the BIA's interpretation of the phrase to mean "an alien described in subparagraphs (A)-(D) of paragraph (1)." *See Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015) ("Consistent with *Chevron*, we are not convinced that the interpretation is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012))); *Olmos v. Holder*, 780 F.3d 1313, 1322 (10th Cir. 2015) ("The text, the statutory clues, and canons of interpretation do not definitively clarify the meaning of § 1226(c)."). The Fourth Circuit has held that "when . . . released" means any time after release, but it did so under a misconception that the BIA had so interpreted the phrase.[3] *Hosh v. Lucero*, 680 F.3d 375, 380-81 (4th

---

[3] As other circuits have recognized, the BIA has never formally interpreted the phrase "when the alien is released." *See, e.g., Sylvain v. Atty Gen. of United States*, 714 F.3d 150, 157 n.9 (3d Cir. 2013) ("The specific term interpreted in *Rojas* is the phrase 'an alien described in paragraph (1).'"). In fact, far from interpreting the phrase in the manner suggested by the Fourth Circuit, the BIA has said in passing that "when . . . released" does require immediacy. *In re Rojas*, 23 I. & N. Dec. 177, 122 (BIA 2001) ("The

Cir. 2012). Finally, the Second, Third, and Tenth Circuits applied the loss-of-authority rule, finding that the AG's duty to detain criminal aliens under § 1226(c)(1) continues even if the government fails to comply with the "when . . . released" condition. *See, e.g., Sylvain v. Atty Gen. of United States*, 714 F.3d 150, 157 (3d Cir. 2013) (holding that "[e]ven if the statute calls for detention 'when the alien is released,' and even if 'when' implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay"); *see also Lora*, 804 F.3d at 612; *Olmos*, 780 F.3d at 1325-26.

On the other hand, the government's position has been rejected by most district courts to consider the question and, most recently, by three of six judges sitting en banc in the First Circuit.[4] *See Castañeda v. Souza*, 810 F.3d 15, 18-43 (1st Cir. 2015) (en banc) (Barron, J.). In an opinion written by Judge Barron, these three judges concluded that the statutory context and legislative history make clear that aliens can be held without bond under § 1226(c)(2) only if taken into immigration custody pursuant to § 1226(c)(1) "when . . . released" from criminal custody, not if there is a lengthy gap after their release. *See id.* at 36, 38.

We agree with Judge Barron and his two colleagues. The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the AG into immigration custody "when [they are] released"

---

statute does direct the [AG] to take custody of aliens immediately upon their release from criminal confinement.").

[4] Because the First Circuit split evenly on the question, its opinions are not binding on lower courts. The district court's judgments were affirmed. *Castañeda*, 810 F.3d at 19.

from criminal custody. And because Congress's use of the word "when" conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens' release from criminal custody.

I.

The named Plaintiffs in this case are lawful permanent residents who have committed a crime that could lead to removal from the United States. Plaintiffs served their criminal sentences and, upon release, returned to their families and communities. Years later, immigration authorities took them into custody and detained them without bond hearings under § 1226(c). Plaintiffs argue that because they were not detained "when . . . released" from criminal custody, they were not subject to mandatory detention under § 1226(c).[5]

Mony Preap, born in a refugee camp after his family fled Cambodia's Khmer Rouge, has been a lawful permanent resident of the United States since 1981, when he immigrated here as an infant. He has two 2006 misdemeanor convictions for possession of marijuana. Years after being released at the end of his sentences for these convictions, Preap was transferred to immigration detention upon serving a short sentence for simple battery (an offense not covered by the mandatory detention statute) and held without a bond hearing. Since the instant litigation began, Preap has

---

[5] Plaintiffs raised both a statutory challenge and a Due Process challenge before the district court. The district court resolved the case on statutory grounds, and thus did not reach the Due Process question. *Preap v. Johnson*, 303 F.R.D. 566, 574 n.5 (N.D. Cal. 2014). Neither do we.

been granted cancellation of removal and released from immigration custody.[6]

Eduardo Vega Padilla has been a lawful permanent resident since 1966, shortly after he came to the United States as an infant. Padilla also has two drug possession convictions—one from 1997 and one from 1999—and a 2002 conviction for owning a firearm with a prior felony conviction. Eleven years after finishing his sentence on that last conviction, he was placed in removal proceedings and held in mandatory detention. Padilla eventually obtained release after receiving a bond hearing under our decision in *Rodriguez v. Robbins* (*Rodriguez II*), 715 F.3d 1127, 1144 (9th Cir. 2013), in which we held that the government's detention authority shifts from § 1226(c) to § 1226(a) after a detainee has spent six months in custody; *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-81 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom., Jennings v. Rodriguez*, No. 15-1204, 2016 WL 1182403 (June 20, 2016).

---

[6] The district court rejected the government's argument that Preap's cancellation of removal mooted his claim, and the government has not challenged that determination. We agree that the claims of the named Plaintiffs on behalf of the class are not mooted by Plaintiffs' release from detention or termination of removal proceedings because the claims are "transitory in nature and may otherwise evade review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (explaining when a "claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975))); *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (holding that Article III justiciability requirements were satisfied despite the expiration of the named plaintiff's claim for injunctive relief).

Juan Lozano Magdaleno has been a lawful permanent resident since he immigrated to the United States as a teenager in 1974. Magdaleno has a 2000 conviction for owning a firearm with a prior felony conviction, and a 2007 conviction for simple possession of a controlled substance. He was sentenced to six months on the possession charge and released from jail in January 2008. Over five years later, Magdaleno was taken into immigration custody and held without bond pursuant to § 1226(c). He also was later released from detention following a *Rodriguez* hearing.

These three Plaintiffs filed a class action petition for habeas relief in the Northern District of California. The district court granted their motion for class certification, certifying a class of all "[i]ndividuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." The district court also issued a preliminary injunction requiring the government to provide all class members with bond hearings under § 1226(a).[7] *Preap v. Johnson*, 303 F.R.D. 566, 571, 584 (N.D. Cal. 2014). This appeal followed.

---

[7] The district court held that if the named Plaintiffs prevailed in their interpretation of § 1226(c), then they would have met their burden under all four prongs of the preliminary injunction test set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). The government has waived any challenge to that determination by declining to dispute it on appeal.

II.

We have jurisdiction to review this class action habeas petition under 28 U.S.C. § 1291. The jurisdiction-stripping provision of 8 U.S.C. § 1226(e), which bars judicial review of discretionary agency decisions regarding immigrant detention, does not bar us from hearing "challenges [to] the statutory framework that permits [petitioners'] detention without bail." *Demore v. Kim*, 538 U.S. 510, 517 (2003). We review questions of statutory construction de novo. *United States v. Bert*, 292 F.3d 649, 651 (9th Cir. 2002).

III.

The government's authority to detain immigrants in removal proceedings arises from two primary statutory sources.[8] The first, 8 U.S.C. § 1226(a), grants the AG discretion to arrest and detain any alien upon the initiation of removal proceedings.[9] Under this provision, the AG may then choose to keep the alien in detention, or allow release on conditional parole or bond. 8 U.S.C. § 1226(a)(1)-(2).[10] If the AG opts for deten-

---

[8] Other provisions of the Immigration and Nationality Act (INA) govern the detention of individuals considered "applicants for admission," *see* 8 U.S.C. § 1225(b), or those awaiting deportation after entry of a final order of removal, *see* 8 U.S.C. § 1231(a), among other categories. These detention provisions are not implicated here.

[9] The Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), moved many immigration enforcement responsibilities from the Department of Justice to the Department of Homeland Security. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). Because the statute at issue refers to the Attorney General, we will continue to do so here.

[10] The discretionary detention provision reads as follows:

tion, the alien may seek review of that decision at a hearing before an immigration judge ("IJ"), 8 C.F.R. § 236.1(d)(1), who may overrule the AG and grant release on bond, *id.* § 1003.19. The alien bears the burden of proving his suitability for release, and the IJ should consider whether he "is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 § C.F.R. 1236.1(c)(8).

The second provision is 8 U.S.C. § 1226(c), the mandatory detention provision at issue in this case. Importantly, this provision operates as a limited exception to § 1226(a). *See* 8 U.S.C. § 1226(a). ("Except as provided in subsection (c) of this section . . . "). Section 1226(c) reads as follows:

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on -

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole[.]

8 U.S.C. § 1226(a).

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release **an alien described in paragraph** (1) only if the Attorney General decides pursuant to [the Federal Witness Protection Program] that release of the alien from custody is necessary . . . [and] the alien will not pose a danger to . . . safety

> . . . and is likely to appear for any scheduled proceeding.

8 U.S.C. § 1226(c) (emphases added) (footnote omitted). We must decide the proper scope of this mandatory detention exception, and specifically whether it applies to aliens who are not promptly placed in removal proceedings upon their release from criminal custody for an offense listed in § 1226(c)(1)(A)-(D).

The government advances three arguments to support its view that Plaintiffs are subject to mandatory detention under § 1226(c). First, it argues that we should give *Chevron* deference, as have the Second and Tenth Circuits, to the BIA's interpretation that the phrase "an alien described in Paragraph (1)" means "an alien described in subparagraphs (A)-(D) of paragraph (1)," thus subjecting all criminal aliens who have committed one of the listed crimes to mandatory detention regardless of when they were taken into immigration custody. *See In re Rojas*, 23 I. & N. Dec. 117, 121 (BIA 2001). Second, the government argues that we should follow the Fourth Circuit in holding that "when . . . released" is a duty-triggering clause, not a time-limiting clause, and that, as such, it merely informs the AG when the duty to detain arises, not when the duty must be performed. *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012).[11] Third, the government argues that we should follow the Second, Third, and Tenth Circuits in holding that, even if Congress intended that immigration authorities promptly detain

---

[11] The Fourth Circuit incorrectly attributed this interpretation to the BIA. *See Hosh*, 680 F.3d at 380 (reasoning that the phrase "when . . . released" is ambiguous and deferring to the BIA's "permissible construction").

criminal aliens when they are released from criminal custody, Congress did not clearly intend that they would lose the authority to do so in the event of delay.

We find all three arguments unpersuasive. We agree with Judge Barron and his colleagues on the First Circuit in *Castañeda*, 810 F.3d at 19, that the government's positions contradict the intent of Congress expressed through the language and structure of the statute.

A.

We first address the government's argument that we should defer to the BIA's interpretation of § 1226(c)(2)'s phrase "an alien described in paragraph (1)" to mean "an alien described in subparagraphs (A)-(D) of paragraph (1)." *See Rojas*, 23 I. & N. Dec. at 125 ("We construe the phrasing 'an alien described in paragraph (1),' as including only those aliens described in subparagraphs (A) through (D) of section [(c)(1)], and as not including the 'when released' clause."). Under this interpretation, § 1226(c)(2)'s detention-without-bond requirement applies to any alien who has committed an offense enumerated in § 1226(c)(1), regardless of how long after release from criminal custody he or she was taken into immigration custody. This interpretation is at odds with the statute, which unambiguously links the "when . . . released" custody instruction in § 1226(c)(1) to the without-bond instruction in § 1226(c)(2), such that the latter applies only after the former is satisfied.

When faced with a question of statutory interpretation, our analysis begins "with the text of the statute." *Yokeno v. Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014).

The words of a statute should be accorded their plain meaning, as considered in light of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). We cannot look to the statute's language in isolation because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Starting with the text, we find that § 1226(c)(2) is straightforward. It refers simply to "an alien described in paragraph (1)," not to "an alien described in subparagraphs (1)(A)-(D)." We must presume that Congress selected its language deliberately, thus intending that "an alien described in paragraph (1)" is just that—*i.e.* an alien who committed a covered offense *and* who was taken into immigration custody "when . . . released." *See Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructurers Grp.*, 387 F.3d 1046, 1051 (9th Cir. 2004) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))). Certainly, had Congress wanted to refer only to "an alien described in subparagraphs (A)-(D)," it could have done so. And while we recognize that "Congress has not always been consistent in how it refers to other

subsections in the same statute," *Olmos*, 780 F.3d at 1320 (describing a separate provision where Congress referred to "subparagraph (a)" but the context made it obvious that Congress was referring to only subparts (i) and (ii)), we observe that, unlike the example cited by the Third Circuit in *Olmos*, this section's context supports, rather than contradicts, the plain meaning.[12]

As mentioned, there are two relevant sources of authority for the government's detention of aliens in removal proceedings—§ 1226(a) and § 1226(c). Section 1226(a) provides for discretionary detention of any alien in removal proceedings, while § 1226(c) provides a limited exception of mandatory detention for a specified group of aliens. Thus, if the government is not authorized to detain an alien under the narrow exception of § 1226(c), it may only do so under the general rule of § 1226(a). Critically, however, each of these sections includes its own corresponding instructions for releasing detained aliens—§ 1226(a) provides for possible release on bond, while § 1226(c) forbids any release except under special circumstances concerning witness protection. There is one important consequence of this structure: under both the general detention provision in § 1226(a) and the mandatory detention provision in § 1226(c), the authority to detain and the authority to release go hand in hand. That is, an alien detained under § 1226(a) is clearly subject to

---

[12] We are thus unpersuaded by the government's argument that there is ambiguity in whether the phrase "when the alien is released" modifies the noun "alien" or only the verb "take into custody." Even if we agreed that the phrase were ambiguous standing alone, it is not ambiguous within the section's structure and surrounding language.

the release provisions of § 1226(a), whereas one detained under § 1226(c) is subject to the release provisions in § 1226(c). Accordingly, if an alien is not detained in immigration custody "when . . . released" from criminal custody, as required under § 1226(c)(2), then the government derives its sole authority to detain that alien from § 1226(a)(1), and, as a consequence, it must provide the alien with a bond hearing as required under § 1226(a)(2).

The BIA's interpretation in *In re Rojas* flouts this structure. The BIA held that the "when . . . released" clause was "address[ed] . . . to the statutory command that the 'Attorney General shall take into custody' certain categories of aliens," but that it did not define the categories of aliens subject to the prohibition on bonded release in § 1226(c)(2). *In re Rojas*, 23 I. & N. Dec. at 121. The BIA thereby held, in essence, that the AG can fail to comply with the "when . . . released" requirement of § 1226(c)(1)—thereby necessarily relying on § 1226(a) for its authority to take custody of an alien—but still apply the release conditions of § 1226(c)(2). In other words, even if § 1226(c)(1) authorizes the custody of only those aliens who are detained "when [they are] released" from criminal custody, not those who are detained at a later time, the BIA would still apply § 1226(c)(2)'s proscription on bonded release from immigration custody. This reading simply fails to do justice to the statute's structure. *See Castañeda*, 810 F.3d at 26 (noting that under the BIA's reading, the statute is "oddly misaligned" because it necessarily "de-link[s] the 'Custody' directive in § 1226(c)(1) from the bar to 'Release' in (c)(2)").

The headings in § 1226(c) further illustrate this point. Section 1226(c) as a whole is entitled "Detention of criminal aliens." This heading conveys to the reader that the section provides an exception to the general detention rule of § 1226(a), and that this exception concerns the detention of certain criminal aliens. The two paragraphs within the section are entitled "Custody" and "Release." These headings inform the reader that the section governs the full life cycle of the criminal aliens' detention, with the first paragraph specifying the requirements for taking them into custody, and the second specifying the restrictions on their release. This structure suggests only one logical conclusion: the release provisions of § 1226(c)(2) come into effect only after the government takes a criminal alien into custody according to § 1226(c)(1). And, correspondingly, if the government fails to take an alien into custody according to § 1226(c)(1), then it necessarily may do so only under the general detention provision of § 1226(a), and we never reach the release restrictions in § 1226(c)(2).

Rojas's contrary reading, as Judge Barron explained, would mean that Congress directed the AG to hold without bond aliens "who had never been in criminal custody"—because with the "when . . . released" clause rendered inoperative for purposes of § 1226(c)(2), there would be nothing to impose a requirement of the aliens ever having been in custody.[13] *Castañeda*, 810 F.3d at 27. At the same time,

---

[13] This effect occurs because, as Judge Barron noted in *Castañeda*, "there are a variety of offenses for which an alien may be . . . subject to mandatory detention under [§ 1226(c)(1)(A)], but that may never give rise to a formal charge, let alone an indictment,

Rojas's reading would leave the AG "complete discretion to decide not to take [such aliens] into immigration custody at all." *Id.* These incongruous consequences further persuade us to reject the BIA's reading.

Notably, neither the BIA nor those circuits that deferred to the BIA adequately addressed the structure of the relationship between § 1226(a) and § 1226(c). Indeed, the BIA and the Second Circuit failed to address it at all. *See Lora v. Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015) (deeming it ambiguous whether the "when . . . released" clause "is part of the definition of aliens subject to mandatory detention" without considering statutory context); *In re Rojas*, 23 I. & N. Dec. at 121-22 (considering statutory context but failing to acknowledge the relationship between § 1226(a) and § 1226(c)). The Tenth Circuit did address it, and even seemed to agree with our conclusion that custody must be authorized under paragraph (1) of § 1226(c) in order for paragraph (2) to take effect. *Olmos*, 780 F.3d at 1321 (recognizing that the authority to detain "arises in Paragraph '1'" and that "the [AG] must exercise this responsibility 'when the alien is released'"). But, applying the loss-of-authority doctrine, that court concluded that the government maintains its authority to take custody of an alien under § 1226(c)(1) even when it fails to comply with the "when . . . re-

---

trial or conviction." 810 F.3d at 26 (alterations in original) (quoting *Saysana v. Gillen*, 590 F.3d 7, 14 (1st Cir. 2009)). "In consequence, some aliens who fall within subparagraphs (A)-(D) will not be subject to (c)(1) because they will never have even been 'released' from criminal custody as the 'when . . . released' clause requires." *Id.* at 27. Such aliens can only be taken into immigration custody under the discretionary detention provision in § 1226(a).

leased" requirement. *Olmos*, 780 F.3d at 1321-22 ("With the alien in the [AG's] custody under his delayed enforcement of § 1226(c)(1), there would be nothing odd about § 1226(c)(2)'s restrictions on when the alien can be released."). Finding that the "when . . . released" requirement imposed no actual limitations on the government, the Tenth Circuit thus concluded that the BIA's interpretation—reading out the "when . . . released" requirement—was reasonable. *Id.* We disagree. As we later explain, the loss-of-authority doctrine does not apply to § 1226(c). And absent this doctrine, we are left with the conclusion that the AG must comply with § 1226(c)(1), including the "when . . . released" requirement, before it can apply § 1226(c)(2).

In sum, we conclude that paragraph (2)'s limitations on release unambiguously depend upon paragraph (1)'s mandate to take custody. "An alien described in paragraph (1)" is therefore one who is detained according to the requirements of paragraph (1). These requirements include the mandate that the government take the alien into custody "when . . . released." The BIA's interpretation to the contrary is impermissible.[14]

B.

We must next decide whether the AG is in compliance with § 1226(c)(1)'s custody mandate—and thus § 1226(c)(2)'s limitations on release apply—even if the

---

[14] "Because the statutory language is unambiguous, we end our inquiry at *Chevron*'s first step, and need not reach the question [of] whether the BIA's approach is based on a permissible construction of the statute." *Aragon-Salazar v. Holder*, 769 F.3d 699, 706 (9th Cir. 2014).

AG takes an alien into custody after substantial time has passed since the alien's release from criminal custody. Plaintiffs argue that § 1226(c)(1)'s mandate requiring the AG to detain criminal aliens "when [they are] released" from criminal custody means that they must be taken into custody *promptly* after release, not years later, as were the named Plaintiffs here. The government, on the other hand, argues that the phrase "when . . . released" is ambiguous, supporting either Plaintiffs' reading or a broader reading requiring mandatory detention of any criminal alien arrested by the AG at any point after release from criminal custody. The government's argument wrongly assumes that the BIA had so construed "when . . . released." On the contrary, the BIA explicitly stated that "[t]he statute does direct the [AG] to take custody of aliens *immediately* upon their release from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). And even if the BIA had construed the phrase not to require immediate confinement, the statute would foreclose that construction because "when . . . released" unambiguously requires promptness.

Again, we start with the plain language: "The Attorney General shall take into custody any alien who [commits an enumerated offense] when the alien is released [from criminal custody]." 8 U.S.C. § 1226(c). As Judge Barron observed, the first thing that leaps out is that "Congress chose a word, 'when,' that naturally conveys some degree of immediacy as opposed to a purely conditional word, such as 'if.'" *Castañeda*, 810 F.3d at 37 (citation omitted). Of course, the word

"when" has multiple dictionary definitions.[15] But looking to context, which of these meanings is the intended one is clear. The word "when" used in a command such as this one requires prompt action. Consider a teacher's common instruction to stop writing *when* the exam ends. There is no doubt that such an instruction requires the student to immediately stop writing at the end of the exam period. Or as one district court noted, "if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command . . . is the expectation that the husband is waiting at the moment" school ends. *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1155 (D. Colo. 2013); *see also Khoury v. Asher*, 3 F. Supp. 3d 877, 887 (W.D. Wash. 2014) ("A mandate is meaningless if those subject to it can carry it out whenever they please."). Similarly, the use of the phrase "when . . . released," when paired with the directive to detain, unambiguously requires detention with "some degree of immediacy." *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012).

Indeed, "[i]f Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, we would expect Congress to have said so, given that it spoke with

---

[15] *See, e.g.* Black's Law Dictionary 1842 (3d ed. 1933) (defining "when" alternatively as "[i]mmediately after; as soon as" and as "[i]n case of; on condition that; provided; if"); *see also Hosh*, 680 F.3d at 379-80 (reasoning that the term "when" "can be read, on one hand, to refer to 'action or activity occurring at the time that or as soon as other action has ceased or begun'" or "[o]n the other hand, . . . to mean the temporally broader 'at or during [which] time'" (first quoting *Waffi v. Louiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007), then quoting *Free Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/when)).

just such directness elsewhere in the IIRIRA." *Castañeda*, 810 F.3d at 38 (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added)); *see also Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (noting that Congress "easily could have used the language '*after* the alien is released,' 'regardless of when the alien is released,' or other words to that effect"). But instead Congress chose words that signal an expectation of immediate action. *See Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context [as] a phrase 'gathers meaning from the words around it.'" (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961))). This word choice must be given its due weight.

Moreover, unlike the government's interpretation, our reading is consistent with Congress's purposes in enacting the mandatory detention provision—to address heightened risks of flight and dangerousness associated with aliens who commit certain crimes, which are serious enough to give rise to criminal custody. *See Demore*, 538 U.S. at 518-19 (describing evidence before Congress). These purposes are ill-served when the critical link between criminal detention and immigration detention is broken and the alien is set free for long stretches of time. Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released. Consequently, we can be certain that Congress did not intend to authorize delays in the detention of these criminal aliens. And correspondingly, without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justi-

fied mandatory detention are still present. These considerations are prudently reflected in Congress's decision that these individuals must be detained "when . . . released," and that if they aren't, the AG may detain them only if warranted under the general detention provision of 8 U.S.C. § 1226(a), upon a bond hearing during which an individualized assessment of risks is conducted. We therefore conclude that the phrase "when . . . released" connotes some degree of immediacy.

C.

Finally, we turn to the government's argument that even if § 1226(c)(1) unambiguously requires prompt detention, we should nonetheless uphold the AG's authority to detain without bond an alien who committed a covered offense even when the AG has violated the mandate of § 1226(c)(1). The government points to a line of cases holding that: "[i]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)); *see also id.* at 158 ("Nor, since *Brock* [*v. Pierce County*, 476 U.S. 253 (1986)], have we ever construed a provision that the government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later."); *United States v. Nashville, C & St. L. Ry.*, 118 U.S. 120, 125 (1886); *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009). Under this "loss-of-authority" line of cases, the government's argument goes, the AG's failure to timely take into custody a

criminal alien in no way affects her ability to act pursuant to the mandatory detention provision of § 1226(c)(2). Several circuits have agreed. *See Sylvain*, 714 F.3d at 157; *Lora*, 804 F.3d at 612-13; *Olmos*, 780 F.3d at 1324-26.

The courts adopting this reasoning rely on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), in which the Supreme Court interpreted a provision of the Bail Reform Act that required judicial officers to hold a bond hearing "immediately upon the [defendant]'s first appearance before the judicial officer." 18 U.S.C. § 3142(f)(2). Montalvo-Murillo didn't receive a timely hearing under this provision, and the district court released him from custody. The Supreme Court reversed, holding that "a failure to comply with the first appearance requirement does not defeat the government's authority to seek detention of the person charged." 495 U.S. at 717. The Court noted that nowhere did the statute provide for the release of pretrial detainees as a remedy for the failure by judicial officers to provide prompt hearings. *Id.* And it concluded that "[a]utomatic release contravene[d] the object of the statute, to provide fair bail procedures while protecting the safety of the public and assuring the appearance . . . of defendants . . . ." *Id.* at 719. To hold otherwise, the Court reasoned, would "bestow upon the defendant a windfall" and impose on the public "a severe penalty" by "mandating release of possibly dangerous defendants every time some deviation" from the statute occurred. *Id.* at 720. Looking to this decision, our sister circuits have treated *Montalvo-Murillo* as a "close[] analog" to the dispute over § 1226(c)'s limitations. *Sylvain*, 714 F.3d at 158. We

find, however, that *Montalvo-Murillo* is readily distinguishable.

Critically, unlike in *Montalvo-Murillo*, the government here invokes the loss-of-authority doctrine to justify extending a statutory provision that in fact curtails, rather than expands, the government's discretionary authority. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L. J. 363, 367 (2014) ("The [mandatory detention provision] strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate.").[16] Indeed, the sole practical effect of the district court's decision in this case is to *reinstate* the government's general authority, under § 1226(a), to decline to detain, or to release on bond, those criminal aliens who are not timely detained under § 1226(c). In short, we decline to apply the loss-of-authority doctrine where, as here, there is no loss of authority.

Moreover, unlike the district court's ruling in *Montalvo-Murillo*, our holding does not craft a new remedy inconsistent with the statutory scheme. Whereas in *Montalvo-Murillo* the statute at issue did not identify a remedy for a delayed hearing, *see United*

---

[16] Congress's purposes in enacting the provision further demonstrate its desire to curtail the authority of the immigration judge and DHS to release recently incarcerated criminals from immigration custody. *See Demore v. Kim*, 538 U.S. 510, 518-19 (2003) (noting Congress's concerns that immigration authorities had a "near-total inability to remove deportable criminal aliens" and often made detention decisions on the basis of "funding and detention space").

States v. Montalvo-Murillo, 876 F.2d 826, 831 (10th Cir. 1989) (per curiam) (noting that "Congress did not provide . . . the remedy" for a violation of § 3142(f)), *overruled by Montalvo-Murillo*, 495 U.S. at 722), here the statutory structure makes clear precisely what occurs in the absence of prompt detention under 8 U.S.C. § 1226(c): the general detention provision, 8 U.S.C. § 1226(a), applies. Far from imposing a judicially-created remedy for untimely detention, we are merely holding that under the statute, the conditions for the mandatory detention exception are not met when detention is too long delayed. *See Castañeda*, 810 F.3d at 40-41 (distinguishing several cases where courts improperly fashioned their own sanctions).

We do not share the Third Circuit's concern that failing to apply the loss-of-authority doctrine "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline." *Sylvain*, 714 F.3d at 160. Congress's design of protecting the public by detaining criminal aliens is undoubtedly premised on the notion that *recently* released criminal aliens may be presumed a risk. Such a presumption carries considerably less force when these aliens live free and productive lives after serving their criminal sentences. *See Saysana v. Gillen*, 590 F.3d 7, 17-18 (1st Cir. 2009) ("By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be."). Indeed, the imposition of robotic detention procedures in such cases not only smacks of injustice, but also drains scarce detention

resources that should be reserved for those aliens who pose the greatest risks.

We therefore hold that the mandatory detention provision of 8 U.S.C. § 1226(c) applies only to those criminal aliens who are detained promptly after their release from criminal custody, not to those detained long after.

IV.

In so holding, we are not suggesting that the mandate to detain "when . . . released" necessarily requires detention to occur at the exact moment an alien leaves criminal custody. The plain meaning of "when . . . released" in this context suggests that apprehension must occur with a reasonable degree of immediacy. *Accord Hosh*, 680 F.3d at 381 ("[W]e agree that Congress's command . . . connotes some degree of immediacy . . . ."); *Rojas*, 23 I. & N. Dec. at 122 ("The statute does direct the [AG] to take custody of aliens immediately upon their release from criminal confinement."). Thus, depending on the circumstances of an individual case, an alien may be detained "when . . . released" even if immigration authorities take a very short period of time to bring the alien into custody.

This appeal, however, does not present the question exactly how quickly detention must occur to satisfy the "when . . . released" requirement. The class was defined as those who were not "immediately detained" but were still taken into mandatory custody, and the government did not challenge the class definition on the ground that it required further clarification as to the meaning of "immediately." Nor did the government appeal class certification on the ground that the

named class members were not typical of the class as a whole—even though the named Plaintiffs spent years in their home communities after completing their criminal sentences, whereas some class members presumably were released for shorter times. We thus need not decide for purposes of the instant appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody for the transition to be immediate enough to satisfy the "when . . . released" requirement. The district court granted preliminary injunctive relief to a class of aliens who were not "immediately detained" when released from criminal custody, and that grant of relief accords with our interpretation of the statutory requirements.

* * *

Under the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing only those criminal aliens it takes into immigration custody promptly upon their release from triggering criminal custody.

AFFIRMED.

ICE Detainee Population Statistics by Field Office			
Field Office	**Average Daily Population**	**Number Currently Detained**	**Number Detained with Final Orders**
Atlanta	2,683	2,780	1,010
Baltimore	322	328	143
Boston	810	844	363
Buffalo	535	509	253
Chicago	1,441	1,435	363
Dallas	928	918	361
Denver	459	447	107
Detroit	602	568	211
El Paso	1,235	1,113	187
FOSC	0	0	0
Houston	2,008	1,811	669
Los Angeles	2,304	2,107	483
Miami	2,250	2,169	655
New Orleans	2,320	2,210	1,110
New York City	934	977	357
Newark	1,155	1,144	491
Philadelphia	1,124	999	336
Phoenix	2,753	2,700	788
Salt Lake City	474	494	182
San Antonio	4,167	4,157	2,070
San Diego	1,061	1,046	287
San Francisco	598	613	171
Seattle	1,278	1,346	327
St. Paul	768	675	186
Washington, D.C.	824	777	236
Total	**33,034**	**32,162**	**11,337**

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of N

Average daily population excludes ORR and MRP facilities.

Cited in Preap v. Johnson, No. 14-16326 archived on July 22, 2016

ovember 30, 2011.

ICE Detainee Population Statistics by Fiscal Year

Fiscal Year	Average Daily Population	Total Number Detained During the Year	Average Length of Stay (In Days)
FY 2001	20,251	204,459	40.16
FY 2002	19,922	198,307	41.50
FY 2003	21,178	227,677	37.10
FY 2004	21,928	231,142	40.40
FY 2005	19,718	233,417	38.50
FY 2006	22,975	256,842	33.70
FY 2007	30,295	311,169	36.90
FY 2008	31,771	378,582	30.49
FY 2009	32,098	383,524	31.23
FY 2010	30,885	363,064	31.49
FY 2011	33,330	429,247	29.20
FY 2012 YTD	33,034	71,784	27,836

Statistics for FY 2009 and later years include detainees released on their own recognizance and detainees in Bureau of Prisons facilities.

Figures for FY 2001 to FY 2011 are historical and remain static. Statistics for FY 2012 will change throughout the year as cases are closed and data is entered after the removal has taken place.

FY2012 data is as of IIDS as of 10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

FY2010 - FY2012 data excludes ORR and MIRP facilities.

Average Length of Stay by Fiscal Year
(Top 20 Countries Based on Number Removed to that Country)

Country	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
MEXICO	15.9	17.4	18.1	17.1	15.8
GUATEMALA	34.3	33.6	31.8	33.3	31.6
HONDURAS	34.9	34.9	33.2	35.4	30.4
EL SALVADOR	46.0	47.9	50.2	54.7	53.7
DOMINICAN REPUBLIC	63.7	55.2	57.4	64.8	57.1
BRAZIL	47.0	45.4	44.5	74.8	43.0
COLOMBIA	57.2	55.9	57.6	45.5	65.5
ECUADOR	47.3	46.6	41.8	45.5	48.6
JAMAICA	106.3	118.0	117.7	127.5	155.1
NICARAGUA	56.8	57.7	66.3	72.8	55.9
HAITI	130.1	177.1	130.7	106.8	183.1
PERU	50.1	49.0	53.6	51.0	56.0
CANADA	52.1	49.4	49.1	50.5	42.5
CHINA, PEOPLES REPUBLIC OF	109.5	103.4	96.7	51.0	84.3
INDIA	102.1	97.9	69.6	74.8	98.8
PHILLIPINES	87.5	96.6	93.9	89.2	75.7
UNITED KINGDOM	63.5	60.3	65.1	68.8	61.6
COSTA RICA	46.4	45.6	41.4	46.1	53.5
VENEZUELA	62.1	68.9	64.9	65.2	66.4
SOUTH KOREA	47.4	40.0	34.6	35.8	37.3
Overall	**26.3**	**27.3**	**27.7**	**25.9**	**24.7**

Figures for FY2008 through FY2011 are historical and remain static. Figures for FY 2012 will change throughout the year as cases are closed and data is entered after the removal has taken place.

FY2012 data is as of IIDS v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

FY2010 -FY2012 data excludes OPR and MRP fugitives.

Criminal Alien Program Charging Documents by Field Office						
Field Office	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Atlanta	1,496	7000	8,170	10,396	11,772	1,898
Baltimore	438	1438	1,869	1,573	1,469	250
Boston	1,370	2613	3,452	3,609	2,581	567
Buffalo	353	598	572	751	493	94
Chicago	13,203	19081	11,694	20,740	15,210	2,211
Dallas	10,506	15250	17,173	13,296	14,268	1,974
Denver	3,671	6019	8,294	6,899	5,884	829
Detroit	2,057	4470	5,793	5,626	4,962	679
El Paso	2,319	5795	6,244	6,294	4,429	677
FOSC	0	0	0	31	1,651	569
Houston	5,967	13361	13,311	16,150	14,202	2,342
Los Angeles	19,240	23918	19,543	18,406	21,070	3,419
Miami	5,170	10045	10,214	8,940	9,351	1480
New Orleans	3,465	6292	7,785	8,823	9,777	1557
New York City	6,622	9778	7,651	7,818	7,367	1052
Newark	1,470	4503	5,214	4,631	4,072	678
Philadelphia	3,627	5051	6,052	4,615	4,621	720
Phoenix	10,724	7142	10,990	8,050	6,177	809
Salt Lake City	3,997	6999	7,365	6,391	5,297	653
San Antonio	4,477	11704	10,312	12,766	11,331	1,834
San Diego	10,920	12241	11,194	9,058	11,047	1905
San Francisco	18,001	27385	27,428	24,080	25,477	3,751
Seattle	4,203	9104	10,654	8,644	7,379	1156
St. Paul	1,959	4971	6,217	6,955	5,743	894
Washington, D.C.	1,686	3191	3,215	3,817	5,692	586
Unassigned	24,286	6098	3,479	6,284	1,121	210
Total	164,296	221,085	232,796	223,217	212,744	32,674

FY 2007-2011 data from EIDs is historical and remains static

FY2012 data is as of EIDs v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011

Book-Ins by Fiscal Year					
Fiscal Year	Total Book-Ins	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
FY 2001	204,459	79,943	39.1%	124,516	60.9%
FY 2002	198,307	81,108	40.9%	117,199	59.1%
FY 2003	227,677	90,547	39.8%	137,130	60.2%
FY 2004	231,142	93,196	40.3%	137,946	59.7%
FY 2005	233,417	93,834	40.2%	139,583	59.8%
FY 2006	256,842	97,446	37.9%	159,396	62.1%
FY 2007	311,169	130,784	42.0%	180,385	58.0%
FY 2008	378,582	108,812	28.7%	269,770	71.3%
FY 2009	383,524	105,116	27.4%	278,408	72.6%
FY 2010	363,064	186,927	51.5%	176,137	48.5%
FY 2011	429,247	197,472	46.0%	231,775	54.0%
FY 2012 YTD	71,784	29,723	41.4%	42,061	58.6%

Figures for FY 2001 to FY 2011 are historical and remain static. Statistics for FY 2012 will change throughout the year as cases are closed.

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November 30, 2011.

FY2010 - FY2012 data excludes ORR and MIRP facilities.

A "criminal" is defined as by criminality at time of book-in based on the criminality book-in variable.

Removals by Fiscal Year					
	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Criminal	114,415	136,343	195,772	216,698	28,573
Percent Criminal	31%	35%	50%	55%	50%
Non-Criminal	254,806	253,491	197,090	180,208	28,762
Percent Non-Criminal	69%	65%	50%	45%	50%
Total Removals	**369,221**	**389,834**	**392,862**	**396,906**	**57,335**

FY2012 data is as of IIDS v1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of November

Figures for FY2005 through FY2011 are historical IIDS Data and remain static.

FY2008 - FY2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Wit

A "criminal" is defined as those with a convicted status and a criminal as of date.

starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,449. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,990 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 33,990 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 355,145

FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given angular however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Report. This will result in a higher number of recorded removals in an FY than actual departures

cited in Precap v. Johnson, No. 14-10

30, 2011.

dismiss.

cited in Preap v. Johnson, No. 14-16326 archived on July 22, 2016

Removals by Field Office

Field Office	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012 YTD
Atlanta	18,611	18,812	20,292	22,963	2,943
Baltimore	821	712	859	1,798	237
Boston	4,125	3,248	2,990	3,315	477
Buffalo	3,453	2,923	2,876	3,489	415
Chicago	11,646	9,830	10,346	11,786	1,581
Dallas	17,997	19,190	16,136	15,942	2,123
Denver	6,261	7,364	6,617	5,634	733
Detroit	8,010	8,358	8,054	7,298	1,064
El Paso	17,569	19,292	21,255	36,196	7,714
Houston	17,312	21,159	21,645	20,450	3,426
Los Angeles	24,190	25,488	23,875	24,826	3,452
Miami	13,622	16,543	15,345	16,578	2,303
New Orleans	14,503	15,549	15,067	15,363	2,076
New York City	2,163	2,421	2,028	3,522	396
Newark	4,463	5,112	5,502	5,305	809
Philadelphia	5,331	6,394	6,629	6,746	946
Phoenix	76,450	81,484	92,592	56,198	5,568
Salt Lake City	6,834	8,377	7,698	6,614	811
San Antonio	55,189	58,065	53,424	63,090	10,538
San Diego	24,569	23,158	18,086	33,006	4,693
San Francisco	17,165	17,225	21,361	19,120	2,624
Seattle	10,910	10,837	9,833	7,607	1,020
St. Paul	5,309	6,359	5,925	5,748	780
Washington	1,958	1,922	1,847	2,812	483
Fugitive Operations Support Center	0	0	878	1,500	121
Total	369,221	389,834	392,862	396,906	57,335

FY 2012 data is as of IIDS v 1.10 December 3, 2011 as provided by the Statistical Tracking Unit, not from EID data as of November 30, 2011

Figures for FY2008 through FY2011 are historical IIDS Data and remain static.

FY 2008 - FY 2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departure and Withdrawals

A "Removal" is defined as those with a documented charge and a removal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2008, excluding the "lag" from FY2008, was 352,700. The number of removals in FY2010, excluding the "lag" from FY2009, was 386,440. This number does not include 16,732 expedited removal cases, which ICE closed on behalf of CBP in FY2010. Of those 16,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,153,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 383,143.

FY Date Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month, however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Removals by Field Office for FY 2012 YTD
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	2,943	2,089	71%	854	29%
Baltimore	237	123	52%	114	48%
Boston	477	216	45%	261	55%
Buffalo	415	251	60%	164	40%
Chicago	1,581	946	60%	635	40%
Dallas	2,123	1,517	71%	606	29%
Denver	735	552	75%	183	25%
Detroit	1,064	552	52%	512	48%
El Paso	7,714	2,320	30%	5,394	70%
Houston	3,426	2,379	69%	1,047	31%
Fugitive Operations Support Center	121	0	0%	121	100%
Los Angeles	3,452	2,441	71%	1,011	29%
Miami	2,303	901	39%	1,402	61%
New Orleans	2,076	1,365	66%	711	34%
New York City	596	275	46%	321	54%
Newark	809	332	41%	477	59%
Philadelphia	946	632	67%	314	33%
Phoenix	5,368	3,043	57%	2,325	43%
Salt Lake City	811	560	69%	251	31%
San Antonio	10,538	3,751	36%	6,787	64%
San Diego	4,693	1,448	31%	3,245	69%
San Francisco	2,624	1,495	57%	1,129	43%
Seattle	1,020	601	59%	419	41%
St. Paul	780	491	63%	289	37%
Washington	483	293	61%	190	39%
Total	57,335	28,573	50%	28,762	50%

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit, but from EID data as of Nov

Figures for FY2008 through FY2011 are historical iIDS Data and remain static.

FY2008 - FY2012 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departure, an

A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.

FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month, however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Cited in Prezp v. Johnson, No. 14-15326 archived on July 22, 2016

vember 30, 2011.

d Withdrawal:

Removals by Field Office for FY 2011
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	22,963	15,203	66%	7,760	34%
Baltimore	1,798	753	42%	1,045	58%
Boston	3,315	1,281	39%	2,034	61%
Buffalo	3,489	1,986	57%	1,503	43%
Chicago	11,786	7,491	64%	4,295	36%
Dallas	15,942	10,570	66%	5,372	34%
Denver	5,634	3,902	69%	1,732	31%
Detroit	7,298	3,741	51%	3,557	49%
El Paso	36,196	17,012	47%	19,184	53%
Houston	20,450	15,206	74%	5,244	26%
Fugitive Operations Support Center	1,500	23	2%	1,477	98%
Los Angeles	24,826	17,429	70%	7,397	30%
Miami	16,578	6,928	42%	9,650	58%
New Orleans	15,363	9,249	60%	6,114	40%
New York City	3,522	1,326	38%	2,196	62%
Newark	5,305	2,240	42%	3,065	58%
Philadelphia	6,746	4,159	62%	2,587	38%
Phoenix	56,198	27,885	50%	28,313	50%
Salt Lake City	6,614	4,406	67%	2,208	33%
San Antonio	63,090	28,533	45%	34,557	55%
San Diego	33,006	14,412	44%	18,594	56%
San Francisco	19,120	12,615	66%	6,505	34%
Seattle	7,607	5,272	69%	2,335	31%
St. Paul	5,748	3,467	60%	2,281	40%
Washington	2,812	1,609	57%	1,203	43%
Total	396,906	216,698	55%	180,208	45%

FY2011 data is historical and remains static. FY2011 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.

FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Removals by Field Office for FY 2010
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	20,292	11,830	58%	8,462	42%
Baltimore	859	271	32%	588	68%
Boston	2,990	1,047	35%	1,943	65%
Buffalo	2,876	1,547	54%	1,329	46%
Chicago	10,346	5,386	52%	4,960	48%
Dallas	16,136	8,342	52%	7,794	48%
Denver	6,617	4,447	67%	2,170	33%
Detroit	8,054	3,504	44%	4,550	56%
El Paso	21,255	11,294	53%	9,961	47%
Fugitive Operations Support Center	879	40	5%	839	95%
Houston	21,645	17,013	79%	4,632	21%
Los Angeles	23,875	15,215	64%	8,660	36%
Miami	15,345	5,314	35%	10,031	65%
New Orleans	15,067	7,451	49%	7,616	51%
New York City	2,028	555	27%	1,473	73%
Newark	5,502	1,830	33%	3,672	67%
Philadelphia	6,629	3,892	59%	2,737	41%
Phoenix	92,592	35,937	39%	56,655	61%
Salt Lake City	7,699	4,487	58%	3,212	42%
San Antonio	55,124	23,538	43%	31,586	57%
San Diego	18,086	10,916	60%	7,170	40%
San Francisco	21,361	13,249	62%	8,112	38%
Seattle	9,833	4,714	48%	5,119	52%
St. Paul	5,925	2,817	48%	3,108	52%
Washington	1,847	1,136	62%	711	38%
Total	392,862	195,772	50%	197,090	50%

FY2010 data is historical and remains static. FY2010 Removal Data Includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.
A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.
FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month, however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Removals by Field Office for FY 2009
Criminals and Non-Criminals

Field Office	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
Atlanta	18,812	7,379	39%	11,433	61%
Baltimore	712	144	20%	568	80%
Boston	3,248	796	25%	2,452	75%
Buffalo	2,925	1,384	47%	1,541	53%
Chicago	9,830	4,603	47%	5,227	53%
Dallas	19,190	6,460	34%	12,730	66%
Denver	7,364	3,013	41%	4,351	59%
Detroit	8,358	2,798	33%	5,560	67%
El Paso	19,292	6,171	32%	13,121	68%
Houston	21,159	13,674	65%	7,485	35%
Los Angeles	25,488	9,215	36%	16,273	64%
Miami	16,543	3,842	23%	12,701	77%
New Orleans	15,540	5,879	38%	9,661	62%
New York City	2,421	755	31%	1,666	69%
Newark	5,112	1,517	30%	3,595	70%
Philadelphia	6,394	3,081	48%	3,313	52%
Phoenix	81,484	23,563	29%	57,921	71%
Salt Lake City	8,377	3,390	40%	4,987	60%
San Antonio	58,065	11,934	21%	46,131	79%
San Diego	23,181	10,402	45%	12,779	55%
San Francisco	17,225	8,345	48%	8,880	52%
Seattle	10,837	4,468	41%	6,369	59%
St. Paul	6,355	2,759	43%	3,596	57%
Washington	1,922	771	40%	1,151	60%
Total	389,834	136,343	35%	253,491	65%

Figures for FY2009 are historical IIDS Data and remain static. FY2009 Removal Data Includes Returns. The term "Returns" includes Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

A "criminal" is defined as: those with a convicted status and a criminal arrest date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. That number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 35,960 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 35,960 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,140.

FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Removals by Country for FY 2012 YTD
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
MEXICO	41,543	22,075	53%	19,468	47%
GUATEMALA	4,720	1,633	35%	3,087	65%
HONDURAS	3,778	1,630	43%	2,148	57%
EL SALVADOR	2,765	1,244	45%	1,521	55%
DOMINICAN REPUBLIC	514	315	61%	199	39%
BRAZIL	472	85	18%	387	82%
COLOMBIA	314	199	63%	115	37%
ECUADOR	261	103	39%	158	61%
JAMAICA	214	174	81%	40	19%
NICARAGUA	204	82	40%	122	60%
HAITI	200	103	52%	97	49%
PERU	146	75	51%	71	49%
CANADA	133	61	46%	72	54%
CHINA, PEOPLES REPUBLIC OF	131	31	24%	100	76%
INDIA	117	21	18%	96	82%
PHILIPPINES	93	39	42%	54	58%
UNITED KINGDOM	70	30	43%	40	57%
COSTA RICA	62	20	32%	42	68%
VENEZUELA	57	25	44%	32	56%
SOUTH KOREA	54	16	30%	38	70%
Overall	55,845	27,961	50%	27,887	50%

FY2012 data is as of IIDS v 1.10 December 5, 2011 as provided by the Statistical Tracking Unit. Not from EID data as of Nov
Figures for FY2008 through FY2011 are historical IIDS Data and remain static.

FY2008 - FY2012 Removal Data Includes Returns. The term Removals also Voluntary Returns, Voluntary Departures and
A "criminal" is defined as those with a convicted charge and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the those whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 371,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of these 76,732, 63,909 cases resulted from a joint CBP/ICE operation at Airports. ICE spent $1,155,360 on these 63,909 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 383,525.

FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

6426 archives 22, 2016

.rch 30, 2011.

l Withdrawn.

cited in Preap v. Johnson, No. 14-16326 archived on July 22, 2016

Removals by Country for FY 2011
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non Criminals
MEXICO	286,893	169,781	59%	117,112	41%
GUATEMALA	33,324	12,663	38%	20,661	62%
HONDURAS	23,822	11,318	48%	12,504	52%
EL SALVADOR	18,870	8,931	47%	9,939	53%
BRAZIL	3,634	619	17%	3,015	83%
DOMINICAN REPUBLIC	3,380	2,199	65%	1,181	35%
COLOMBIA	2,273	1,132	50%	1,141	50%
ECUADOR	1,991	805	40%	1,186	60%
NICARAGUA	1,693	771	46%	922	54%
JAMAICA	1,572	1,289	82%	283	18%
CHINA, PEOPLES REPUBLIC OF	1,297	230	18%	1,067	82%
PERU	1,190	540	45%	650	55%
CANADA	923	467	51%	456	49%
INDIA	854	180	21%	674	79%
PHILIPPINES	808	360	45%	448	55%
HAITI	731	249	34%	482	66%
POLAND	492	175	36%	317	64%
SRI LANKA	481	22	5%	459	95%
COSTA RICA	440	186	42%	254	58%
INDONESIA	423	33	8%	390	92%
Overall	385,091	211,950	55%	173,141	45%

FY2011 data is historical and remains static. FY2011 Removal Data includes Returns. The term "Returns" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control

A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of these 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on these 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145

FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

Removals by Country for FY 2010
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
MEXICO	279,687	152,864	55%	126,823	45%
GUATEMALA	31,347	9,806	31%	21,541	69%
HONDURAS	25,835	10,838	41%	14,997	59%
EL SALVADOR	20,309	8,027	40%	12,282	60%
DOMINICAN REPUBLIC	3,889	2,353	61%	1,500	39%
BRAZIL	3,321	542	16%	2,779	84%
COLOMBIA	2,803	1,298	50%	1,319	50%
ECUADOR	2,559	762	30%	1,797	70%
NICARAGUA	1,975	837	42%	1,138	58%
JAMAICA	1,548	1,225	79%	323	21%
PERU	1,169	456	39%	713	61%
CANADA	1,041	515	49%	526	51%
CHINA, PEOPLES REPUBLIC OF	902	166	18%	736	82%
PHILIPPINES	941	343	41%	498	59%
INDIA	794	197	25%	597	75%
UNITED KINGDOM	565	212	38%	353	62%
POLAND	561	188	34%	373	66%
COSTA RICA	505	170	34%	335	66%
VENEZUELA	499	117	23%	382	77%
INDONESIA	428	49	11%	379	89%
Overall	388,757	191,395	50%	194,362	50%

FY2010 data is historical and accurate as of EOY. FY2010 Removal Data Includes Returns. The term "Removals" includes Voluntary Returns, Voluntary Departures, and Withdrawals under Docket Control.

A "criminal" is defined as a alien with a conviction status and a criminal sentence.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens processed or removed in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2008, excluding the "lag" from FY2008, was 387,599. The number of removals in FY2007, excluding the "lag" from FY2006, was 391,440. The number does not include 76,772 expedited removal cases which ICE cleared on behalf of CBP in FY2010. Of these 76,772, 10,900 cases resulted from a past CBP ICE operation in Arizona. ICE spent $4,459,260 to clear 10,900 cases. The number of returns for FY2010, excluding the "lag" from FY2011, was 107,143.

FY Data Lag Case Closure Lag is defined as the period between the date of the alien's departure and the date the case is case closed in EARM and subsequent FY after the data is locked. Since the data is locked the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Publication. This will result in a higher number of recorded removals in an FY than actual departures.

14-16326 archived on July 22, 2016
NO
cited in Prep

Removals by Country for FY 2009
(Top 20 Countries Based on Number Removed to that Country)
Criminals and Non-Criminals

Country	Removals	Number of Criminals	Percent Criminals	Number of Non-Criminals	Percent Non-Criminals
MEXICO	275,217	104,274	38%	170,943	62%
GUATEMALA	30,411	6,502	21%	23,909	79%
HONDURAS	27,679	6,939	25%	20,740	75%
EL SALVADOR	21,157	6,318	30%	14,839	70%
DOMINICAN REPUBLIC	3,850	2,176	57%	1,674	43%
BRAZIL	3,298	384	12%	2,914	88%
COLOMBIA	2,778	1,127	41%	1,651	59%
ECUADOR	2,526	645	26%	1,881	74%
NICARAGUA	2,190	615	28%	1,575	72%
JAMAICA	1,630	1,254	77%	376	23%
PERU	1,212	377	31%	835	69%
CHINA, PEOPLES REPUBLIC OF	964	138	14%	826	86%
CANADA	842	391	46%	451	54%
INDIA	807	188	23%	619	77%
HAITI	710	468	66%	242	34%
PHILIPPINES	684	259	38%	425	62%
UNITED KINGDOM	663	199	30%	464	70%
COSTA RICA	573	120	21%	453	79%
POLAND	504	133	26%	371	74%
VENEZUELA	498	132	27%	366	73%
Overall	378,193	132,639	35%	245,554	65%

FY2009 data is historical IIDS Data. It is static and includes Returns. The term "Removal" include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

A "criminal" is defined as those with a convicted status and a criminal as of date.

Starting in FY2009, ICE began to "lock" removal numbers on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,132 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent $1,155,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.

FY Data Lag Case Closure Lag is defined as the physical removal of an alien occurring in a given month, however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.

SINCE 1828 MENU

Analytical

when

adverb | \ hwen, wen, (h)wən \

Popularity: Top 40% of words

Simple Definition of WHEN

: at what time

: at, in, or during which

: at or during which time

Cited in Phrase + Junction, No. 14 (2020) archived on July 22, 2

Source: Merriam-Webster's Learner's Dictionary

Examples: when is a sentence

Full Definition of WHEN

1 : at what time <when will you return>

2 a : at or during which time
b : and then

3 : at a former and usually less prosperous time
<brag fondly of having known him when —
Vance Packard>

WORD OF THE DAY

usufruct

the right to use or enjoy something

Get Word of the Day daily email

Your email address

See when defined for English-language learners

See when defined for kids

TRENDING NOW

1 dystopian
'A dystopian nightmare'

2 abrogate, servile
'That pledge was not a blanket commit...

3 kleptocracy
The U.S. seeks to recover more than ...

4 empathy
An increase in empathy?

5 plagiarism, plagiarize
To steal and pass off the words of an...

SEE ALL >

Examples of WHEN in a sentence

When did the American Civil War begin?

The detective asked me *when* I last saw her.

When is the next performance?

It was a time *when* people didn't have to lock their doors.

the happy days *when* we were together

We're still waiting for the test results, *when* we'll decide our next move.

Cited in Johnson, No. 14-163295 archived on July 22, 2015

BROWSE DICTIONARY

wheel watch

wheel well

wheel window

wheelwork

wheelwright

Origin and Etymology of WHEN

Middle English, from Old English *hwanne, hwenne*; akin to Old High German *hwanne* when, Old English *hwā* who — more at *who*

First Known Use: before 12th century

when

conjunction

Simple Definition of WHEN

: at or during the time that

: just after the time that

: at any or every time that

Source: Merriam-Webster's Learners Dictionary

Full Definition of WHEN

1 a : at or during the time that : WHILE <went fishing *when* he was a boy>

b : just at the moment that <stop writing *when* the bell rings>

c : at any or every time that <*when* he listens to music, he falls asleep>

2 : in the event that : IF <a contestant is disqualified *when* he disobeys the rules>

3 a : considering that <why use water at all *when* you can drown in it — Stuart Chase>

b : in spite of the fact that : ALTHOUGH <quit politics *when* I might have had a great career in it>

4 : the time or occasion at or in which <tomorrow is *when* we must decide> <humor is *when* you

WORD GAMES

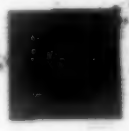
Take a 3-minute break and test your skills!

Which is a synonym of **indolent**?

melancholy | frenetic | lazy | philistine

Test your vocabulary with our 10-question quiz!

TAKE THE QUIZ ›



Test Your Knowledge - and learn some interesting things along the way.

TAKE THE QUIZ ›

Examples of WHEN in a sentence

When he finally showed up, he was drunk.

When I was in school, we didn't have computers.

You can go *when* the bell rings.

Call me *when* you get home.

Things were better *when* he got a job.

When he watches television, he falls asleep.

She quit politics *when* she might have had a great career in it.

Origin and Etymology of WHEN

Middle English, from Old English *hwanne, hwænne*; from *hwanne, hwenne*, adverb

cited in Prestige v. Johnson, No. [illegible]26 archived on July 22, 2016

First Known Use: before [illegible] century

Related to WHEN

Synonyms
as, so long as, while, whilst *[chiefly British]*

Related Words
but, if

Rhymes with WHEN

ben, den, en, fen, Fenn, gen, glen, hen, ken, Ken, n, pen, Rennes, Seine, sen, Sten, ten, then, wen, wren, Wren, yen, Zen

when

pronoun | \hwen, wen\

Simple Definition of WHEN

: what or which time

Source: Merriam-Webster's Learner's Dictionary

Full Definition of WHEN

: what or which time <life-long homes for those who have lived here since *when* — Kim Wyatt>

Claims In Progress v. John Doe, 12-cv-10226 archived on July 22, 2016

See when defined for English-language learners

Examples of WHEN in a sentence

He retired in 1998, since *when* he has been devoting his time to gardening.

You need the report by *when*?

First Known Use of WHEN

14th century

4when

noun

Definition of WHEN

: the time in which something is done or comes
about <troubled his head very little about the hows and whens of life — Laurence Sterne, *Tristram Shandy*>

Click to Print 1 - 2 of 2 Items Archived on July 22, 2015

First Known Use of WHEN

1616

WHEN Defined for Kids

when

adverb | \ hwen, ˈwen, hwən, wən\

Definition of WHEN for Students

1 : at what time <*When* did you leave?>

2 : the time at which <I was not sure of *when* they'd come.>

3 : at, in, or during which <It was hard to remember the time *when* they hadn't played that game ... — Eleanor Estes, *The Hundred*

Preuss v. Johnson, No. 14-16320 archived on July 22, 2016

when

conjunction

Definition of WHEN for Students

1 : at, during, or just after the time that <She wants to leave *when* I do.>

2 : in the event that : IF <*When* you have a question, raise your hand.>

3 : ALTHOUGH 1 <Why do you tease, *when* you know it's wrong?>

"when"

pronoun

Definition of WHEN for Students

: what or which time <Since *when* have you been an expert?>

Filed in Prelim. Application No. 14-16326 archived on July 22, 2016

Learn More about WHEN

Thesaurus: All synonyms and antonyms for *when*

Spanish Central: Translation of *when*

Nglish: Translation of *when* for Spanish speakers

Britannica English: Translation of *when* for Arabic speakers

Seen and Heard

What made you want to look up *when*? Please tell us where you read or heard it (including the quote if possible).

10 Comments Sort by: Newest

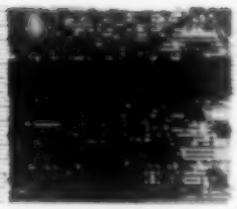
We'll tell you all the
Is 'alright' all right?
It is in fact a real word
One goose, two geese
One moose, tw

WORD GAMES

Advanced Vocabulary Quiz

Tough words and tougher competition. Do yo

TAKE THE QUIZ >



Great Scrabble Words —A Quiz

Words to improve your Scrabble game

TAKE THE QUIZ >

How Strong Is Your Vocabulary?

Test your vocabulary with our 10-question quiz!

TAKE THE QUIZ

Citation

Do you know the person or title these qu

PLAY THE GAME >

Learn a new word every day
Delivered to your inbox!

SPANISH CENTRAL

LARNER'S ESL DICTIONARY

WORDCENTRAL FOR KIDS

VISUAL DICTIONARY

SCRABBLE® WORD FINDER

MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY

BRITANNICA ENGLISH - ARABIC TRANSLATION

NGLISH - SPANISH-ENGLISH TRANSLATION

FOLLOW US

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35482
D.C. No. 2:13-cv-01367-RAJ

BASSAM YUSUF KHOURY; ET AL.,
PLAINTIFFS-APPELLEES

v.

NATHALIE ASHER, FIELD OFFICE DIRECTOR, ICE;
ET AL., DEFENDANTS-APPELLANTS

Argued and Submitted: July 8, 2015
Seattle, Washington
[Filed: Aug. 4, 2016]

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

MEMORANDUM*

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

Defendants appeal from the district court's order certifying a class of alien detainees and declaring that

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

the class was entitled to bond hearings. The class comprised aliens who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody. In granting class certification and declaratory relief, the district court concluded that § 1226(c) applies only to aliens who are detained immediately upon their release from criminal custody. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The plain language of § 1226(c) makes clear that mandatory detention applies only to those aliens detained "when [they are] released" from criminal custody. *See Preap v. Johnson*, slip op. at ___. Because the phrase "when . . . released" conveys a degree of immediacy, "§ 1226(c) applies only to those criminal noncititzens who are detained promptly after their release from criminal custody, not to those detained long after." *Id.* at ___. We disagree with the government's arguments under *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), that it should nonetheless be allowed to hold without bond aliens whose detention is untimely under § 1226(c). *Montalvo-Murillo* is distinguishable. *See Preap v. Johnson*, slip op. at ___.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No.: 13-CV-5754 YGR

MONY PREAP, EDUARDO VEGA PADILLA, AND JUAN LOZANO MAGDALENO, PLAINTIFFS-PETITIONERS

v.

JEH JOHNSON, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS-RESPONDENTS

[Filed: May 15, 2014]

ORDER GRANTING PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION, DENYING DEFENDANTS' MOTION TO DISMISS, AND GRANTING PETITIONERS' MOTION FOR CLASS CERTIFICATION

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno ("Petitioners") bring this immigration habeas corpus class action against Jeh Johnson, Secretary of the United States Department of Homeland Security, *et al.* (the "Government") and challenge their detention without bond under Section 236(c) of the Immigration and Nationality Act ("INA"), Title 8 U.S.C. § 1226(c) ("Section 1226(c)"). In subsection (a) of the same statute, the INA affords individuals a bond hearing in order to be detained pending removal proceedings. In contrast, Section 1226(c) requires mandatory detention pending

removal proceedings for a specifically defined subset of individuals. Petitioners argue that they do not fall within the category defined in Section 1226(c), and therefore cannot be subject to mandatory detention. They seek injunctive and declaratory relief that they, and members of the class, must be afforded a bond hearing so that an immigration judge can determine whether they should be released during the pendency of their removal proceedings.

Now before the Court are three motions: (1) Petitioners' Motion for Preliminary Injunction (Dkt. No. 23); (2) the Government's Motion to Dismiss (Dkt. No. 24); and (3) Petitioners' Motion for Class Certification (Dkt. No. 8). On March 18, 2014, the Court heard oral argument on these motions and on April 1, 2014, the parties provided supplemental briefing. (Dkt. Nos. 45, 46, 47.) The parties concede that the first two motions—Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss—center on a pure issue of statutory interpretation; granting one motion necessarily requires denial of the other. Thus, the Court begins with that purely legal issue and will then address the Motion for Class Certification.

Having carefully considered the parties' arguments, relevant statutes, case law, and for all the reasons stated herein, the Court finds that Section 1226(c) unambiguously requires mandatory detention for individuals who are detained immediately upon release from custody. Thus, as Petitioners do not fall within that category, the Court GRANTS Petitioners' Motions for Preliminary Injunction and DENIES the Government's Motion to Dismiss. The Court also GRANTS Petitioners' Motion for Class Certification, as the class

action mechanism easily and efficiently establishes the right of all class members to a bond hearing pursuant to Section 1226(a).

I. JURISDICTION

Federal district courts may grant writs of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Though some immigration decisions, including bond determinations, are not subject to judicial review, *see, e.g.*, 8 U.S.C. § 1226(e), courts may hear the habeas petitions of immigration detainees raising "constitutional claims or questions of law." *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) (citations omitted). Here, Petitioners argue that the Government's practice of subjecting them, and members of the class, to mandatory detention pursuant to Section 1226(c) is unauthorized by the language of the statute itself. Thus, Petitioners present a pure question of law. The Government does not contest the Court's jurisdiction to hear the case.[1]

II. FACTUAL BACKGROUND

The factual predicate giving rise to this action stems from the Immigration and Customs Enforcement Agency's ("ICE") treatment of each of the three Peti-

---

[1] The Court notes that in the parties' Joint Submission following oral argument, the Government for the first time, in two sentences, challenged the Court's authority to order injunctive relief in this action. (*See* Dkt. No. 46 at 2.) The Government's argument is as untimely as it is unfounded. Section 1226(e) does not bar the relief Petitioners seek. *See Demore v. Kim*, 538 U.S. 510, 516-17 (2003). Nor does Title 8 U.S.C. section 1252(f) bar said relief. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2009). The argument was not raised in the Government's Motion, nor was it briefed.

tioners in this action. Each Petitioner was convicted of a crime enumerated in Section 1226(c), and thereafter charged with removal from the United States and detained by ICE. It is undisputed that the predicate offenses for which Petitioners were detained are offenses enumerated in Section 1226(c)(1)(A)-(D). However, ICE's detention of each Petitioner did not commence at the time each Petitioner was released from custody. Rather, ICE detained Mr. Preap seven years after his relevant misdemeanor convictions; Mr. Padilla, over ten years after his relevant convictions; and Mr. Magdaleno over five years later. Because the Government determined that each petitioner could be detained pursuant to Section 1226(c), none was afforded a bond hearing. The ultimate issue is not whether the Government can detain Petitioners pending such proceedings—Petitioners contend that such detention is proper if evidence adduced at a bond hearing establishes that they present a risk of flight or public danger. Rather, the ultimate issue for resolution is whether the Government was statutorily authorized under Section 1226(c) to detain Petitioners mandatorily and without a regularly-scheduled bond hearing.

A. Petitioner Mony Preap

Petitioner Mony Preap is thirty-two years old. (Dkt. No. 8, Ex. A ("Preap Decl.") ¶ 2.) He was born in a refugee camp and is a native of Cambodia. (*Id.*) Preap entered the United States as an infant in 1981 and is a lawful permanent resident. (*Id.*) He is a single father to his son, who is a United States citizen, and a caretaker for his mother, who is in remission from cancer and suffers from seizures. (*Id.* ¶ 4.)

In 2006, Preap was convicted of two misdemeanor counts of possession of marijuana in violation of California Health and Safety Code section 11357(a) and sentenced to time served. (*Id.* ¶ 7; Dkt. No. 26, Ex. 28 ("Preap DHS Record") at 3.) In 2013, Preap was arrested for inflicting corporal injury on a spouse in violation of California Penal Code section 273.5. (Preap Decl. ¶ 7; Preap DHS Record at 3.) On September 9, 2013, Preap pleaded guilty to battery in violation of California Penal Code section 242 and was sentenced to ninety days of incarceration in the Sonoma County Detention Facility. (Dkt. No. 26, Ex. 27.)

On September 11, 2013, upon his release from the Sonoma County Detention Facility, ICE officers arrested and charged Preap with being removable as a result of his 2006 misdemeanor convictions for possession of marijuana. (Preap Decl. ¶ 3; Preap DHS Record.) Preap was detained at an ICE detention facility pending removal proceedings. (Preap Decl. ¶ 3.) On December 9, 2013, Preap requested a bond hearing, which was denied on December 10, 2013. (Preap Decl. ¶ 6.) While Preap was initially found to be removable as charged, on December 17, 2013, after three months of detention and after the filing of this action, an immigration judge granted Preap a Cancellation of Removal. (Mot. to Dismiss at 3; Dkt. No. 26, Ex. 29.) The Government did not oppose the grant of cancellation of removal and waived its right of appeal.[2] (*See* Dkt. No. 26, Ex. 29.)

---

[2] Although the Government contends that Preap's claim is mooted by his recent Cancellation of Removal, the Court finds that he may properly remain a named plaintiff in this action because of the inherently transitory nature of his claim, and because it is capable

B. Petitioner Eduardo Vega Padilla

Petitioner Eduardo Vega Padilla is forty-eight years old. (Dkt. No. 8, Ex. B ("Padilla Decl.") ¶ 2.) He came to the United States in 1966 from Mexico when he was sixteen months old and became a lawful permanent resident that same year. (*Id.*) Padilla has five children, all of whom are United States citizens. (*Id.* ¶ 3.) He also has six grandchildren and three siblings who are also United States citizens and live in the Sacramento area. (*Id.*) Prior to detention, Padilla lived with his mother, his daughter, and his grandson. (*Id.*)

In 1997, Padilla was convicted for possession of a controlled substance (methamphetamine), a misdemeanor, in violation of California Health and Safety Code section 11377(a). (*Id.* ¶ 7; Dkt. No. 26, Ex. 3 ("Padilla Records I.").) Padilla was sentenced to thirty days. (Padilla Records I.) In 2000, Padilla was convicted of felony possession of methamphetamine in violation of California Health and Safety Code section 11377(a) and was sentenced to 180 days of confinement. (Dkt. No. 26, Ex. 4 ("Padilla Records II") at 6.) While on probation for the second offense, police officers searching Padilla's home discovered a firearm in a shed behind his home. (Padilla Decl. ¶ 7.) Padilla was convicted of being a felon in possession of a firearm in violation of California Penal Code section 12021(a)(1) and was sentenced to 180 days in jail. (Padilla Decl. ¶ 7; Dkt. No. 26, Ex. 5 ("Padilla Records III") at 7.) Padilla was released in 2002. (Padilla Decl. ¶ 7.)

---

of repetition, yet evading review. *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 398-99 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

Over ten years after Padilla's release from his sentence from the firearms conviction, on August 15, 2013, ICE charged Padilla with being removable from the United States based on his controlled substances and firearm convictions. (Dkt. No. 26, Exs. 9, 10.) ICE agents went to Padilla's home and he turned himself over voluntarily. (Padilla Decl. ¶ 4.) On October 15, 2013, an immigration judge found that Padilla was lawfully detained under Title 8 U.S.C. section 1226(c); thus, he was not eligible for a bond hearing despite the fact that he was not detained upon his release in 2002. (Dkt. No. 26, Ex. 13.)

On December 3, 2013, an immigration judge ordered Padilla removed from the United States under Title 8 U.S.C. section 1227(a)(2)(A)(iii) as an alien convicted of a controlled substance offense. (Dkt. No. 26, Ex. 11.) On December 26, 2013, Padilla appealed the removal order to the Board of Immigration Appeals ("BIA") where it remains pending. (Dkt. No. 26, Ex. 12.) On February 14, 2014, having been held for six months, Padilla became eligible for a bond hearing in accordance with the Ninth Circuit's preliminary injunction in *Rodriguez v. Robbins*.[3] *See Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) ("*Rodriguez II*"). On March 7, 2014, Padilla received his six- month *Rodri-*

---

[3] Under the Ninth Circuit's ruling in *Rodriguez v. Robbins*, once an alien detained under Title 8 U.S.C. section 1226(c) has been subject to detention for six months, the statutory authorization for detention converts to Title 8 U.S.C. section 1226(a) and the Government is obligated to provide an individualized bond hearing. *See Rodriguez II*, 715 F.3d at 1138. Effectively, an individual can only be held pursuant to Section 1226(c)—and thus be denied the opportunity for a bond hearing—for six months. *See id.*

guez hearing and was released on bond. (Dkt. No. 38, Ex. B.)

C. PETITIONER JUAN LOZANO MAGDALENO

Petitioner Juan Lozano Magdaleno is a fifty-seven year old native of Mexico. (Dkt. No. 8, Ex. C ("Magdaleno Decl.") ¶ 2.) Magdaleno came to the United States in 1974 and has been a lawful permanent resident for thirty-nine years. (*Id.*) Prior to detention, Magdaleno lived with his wife, two of his four children, his son-in-law, and one of his ten grandchildren, all of whom are United States citizens. (*Id.* ¶ 4.)

On October 13, 2000, Magdaleno was convicted as a felon in possession of a firearm in violation of California Penal Code section 12021(a)(1). (Dkt. No. 26, Ex. 16 ("Magdaleno Records").) According to Magdaleno, he earned a living by purchasing storage units at auctions and selling the contents of the units at his thrift store. (Magdaleno Decl. ¶ 9.) Bidders on storage units do not know the contents of the units prior to purchase, and one of the units that Magdaleno purchased contained an old rifle. (*Id.*) When police officers came to Magdaleno's thrift store on an unrelated matter, they arrested him for possessing the rifle. (*Id.*) Magdaleno was sentenced to 147 days of confinement and 3 years of probation. (Magdaleno Records.)

On August 21, 2007, Magdaleno was convicted of driving on a suspended license/driving under the influence in violation of California Vehicle Code section 14601.2(a), a misdemeanor, and possession of a controlled substance (methamphetamine), a felony, in violation of California Health and Safety Code section 11377(a). (Dkt. No. 26, Ex. 18.) He was sentenced to

six months of confinement and released in January 2008. (*Id.*; Magdaleno Decl. ¶ 10.)

Five years after his release, on July 17, 2013, ICE arrested Magdaleno at his residence and charged him with removal based upon his October 2000 and May 2007 convictions. (Dkt. No. 26, Ex. 22.) Magdaleno was detained that same day at the West County Detention Center in Richmond, California. (Magdaleno Decl. ¶ 3.)

Magdaleno challenged ICE's charges of removability, but the immigration judge denied his application for relief from removal and ordered that he be removed. (Dkt. No. 26, Ex. 24 at 7-8.) On December 26, 2013, Magdaleno appealed the removal to the BIA. (Dkt. No. 26, Ex. 25.) This appeal remains pending. (Mot. to Dismiss at 6; Dkt. No. 34 ("Petitioners' Traverse") at 5.)

On December 9, 2013, Magdaleno requested a bond hearing and challenged his detention before an immigration judge. (Magdaleno Decl. ¶ 3.) That judge found that Magdaleno was lawfully detained under Title 8 U.S.C. section 1226(c) despite not having been detained by ICE upon release from custody and was not due an individualized bond hearing. (Dkt. No. 26, Ex. 23.)

On February 14, 2014, Magdaleno was provided a *Rodriguez* hearing, and he was denied release due to the determination that he was a flight risk. (Dkt. No. 28 ¶¶ 2, 3.) The immigration judge based this determination in part on the fact that Magdaleno was appealing his removal order. (*Id.* ¶ 3.)

III. MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS

The parties agree that resolution of Petitioners' Motion for Preliminary Injunction and Defendant's Motion to Dismiss turns on a question of pure statutory interpretation: what is the meaning of the phrase "when the alien is released" in Section 1226(c)?[4] Accordingly, the Court resolves this question first.[5]

A. STATUTORY OVERVIEW

Congress has enacted a multi-layered statutory scheme that provides for civil detention of aliens during removal proceedings. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). Section 1226 is one such provision. Where an alien falls within Section 1226 determines whether his detention is discretionary (as provided in Section 1226(a)) or mandatory (as provided in Section 1226(c)).

---

[4] If Petitioners' interpretation of Section 1226(c) prevails, they will have established all four prongs of the preliminary injunction test: a likelihood of success on the merits, that the balance of equities tips in their favor, the likelihood of irreparable harm in the absence of injunctive relief, and that granting an injunction will serve the public interest. If Petitioners' interpretation fails and the Government's succeeds, Petitioners will have failed to state a claim and the Government's Motion to Dismiss will be granted.

[5] Petitioners alternatively argue that the Government's practice of subjecting them to mandatory detention pursuant to Section 1226(c) long after "when [they were] released" from state custody violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Because the Court finds that Petitioners' claim is conclusively resolved on statutory interpretation grounds, the Court need not, and therefore does not, address the merits of Petitioners' Due Process argument.

Pursuant to Section 1226(a), when an alien is charged with removal, ICE may seek to have that individual detained pending removal proceedings. Section 1226(a) affords the Government discretion to release an individual on his own recognizance or on bond while his removal case is pending if the Government determines that release would not present a risk of flight or a danger to the community. 8 U.S.C. § 1226(a). However, if the alien falls within the category of individuals defined in Section 1226(c), Congress requires mandatory detention while removal proceedings are pending. This case stems from the parties' disagreement on the legal interpretation and application of Section 1226(c), which reads in pertinent part as follows:

> (c) **Detention of criminal aliens. (1) Custody.** The Attorney General ***shall take into custody*** any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an of-

> fense for which the alien has been sentenced to a term of imprisonment of at least 1 year, **or**
>
> (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist activities"] of this title or deportable under section 1227(a)(4)(B) ["Terrorist activities"] of this title,
>
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) **Release.** The Attorney General may release ***an alien described in paragraph (1)*** only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness [. . .], and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c) (brackets and emphasis supplied). Thus, the mandatory detention provision of Section 1226(c) admits of only one exception as set forth in subsection (2), *i.e.*, where the need for witness protection exists. This exception is of no relevance to the instant case.

B. Summary of the Parties' Competing Interpretations

Petitioners argue that Section 1226(c) is plain in its mandate that "the Attorney General shall take into custody" an individual who has committed an enumerated offense "when the alien is released," not at some later date, but quite simply, at the moment of his or her release. Said differently, the Government is required to apprehend such individuals "when [they are] released," thus effecting a seamless transition from state to federal custody and ensuring their detention pending removal proceedings. Petitioners contend that because they were not apprehended by the Government when they were released from state custody, they do not fall within the scope of Section 1226(c)'s mandatory detention provision because they are not aliens "described in paragraph (1)." *See* 8 U.S.C. § 1226(c)(2). Rather, aliens "described in paragraph (1)" and consequently denied bond hearings are only those who: (i) commit a predicate offense, and (ii) are taken into custody "when [they are] released."

The Government advances a different interpretation of Section 1226(c), relying on *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). There, in a split decision, the BIA acknowledged that Section 1226(c) does require that custody occur "immediately upon [] release." *Rojas*, 23 I&N Dec. at 122. The BIA nonetheless ignored that mandate and determined that Section 1226(c)'s mandatory detention provision applies to any individuals who commit an offense enumerated in Section 1226(c)(1)(A)-(D) regardless of when the individual is apprehended. The Government argues that the BIA's interpretation of Section 1226(c) should be

granted deference because the statute admits of ambiguity that the agency reasonably resolved. As further evidence that the statute is ambiguous, the Government posits that the term "when" can be understood to mean "at any time after" as well as "immediately upon." (Deft. Mot. to Dismiss at 15.) Thus, Government asserts that its practice of apprehending individuals at any point after they are released complies with Congress's directive.

C. ANALYSIS

1. Standard of Review

When Petitioners seek judicial review of the interpretation of a statute by an administrative agency, a court must apply the deferential test for evaluating an agency decision set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a court must first inquire whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. If the statute is unambiguous the inquiry ends, for a court need not defer to an agency's interpretation of a statute "[i]f the intent of Congress is clear." *Id.* at 842. If the statute is found to be ambiguous or silent with respect to the specific issue, the court then evaluates "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The parties' dispute centers on the meaning of the phrase "when . . . released" as used in Section 1226(c). The Government asserts that the term "when" can be understood to mean "at any time after" as well as "immediately upon." Petitioners contend that the term can be read to mean only "immediately upon" or "at the moment of release." Thus, the Court

first turns to the question of what the phrase "when . . . released" as set forth in Section 1226(c) means and whether it is ambiguous.

2. Whether Section 1226(c) is Ambiguous

When interpreting a statute, the Court must begin with the language of the statute itself. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975); *see also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (to interpret a statute, a court must give words their "ordinary or natural" meaning) (citation omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

Section 1226(c)(1) consists of one relevant and long sentence that, when read in a condensed form, provides clarity:

> The Attorney General ***shall*** take into custody any alien who—[has committed an enumerated offense], ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (brackets and emphasis supplied). The primary question presented is whether "when . . . released" means immediately upon release or at any time after release. For three reasons, the Court finds that the former meaning controls.

First, the language itself establishes a mandate with an inherent immediacy requirement. By including the language "[t]he Attorney General ***shall***" in Section 1226(c), Congress issued a command that the Government take into custody such individuals at the moment they are released ("when . . . released") from state custody, not at some undefined time in the future. Such is the meaning of the term "when" as used in this manner. If one is commanded to do something "when" another event occurs, the term "when" cannot reasonably be read to permit potentially unbounded delay. The fact that there is a command, which admits of no discretion by its very nature, does not support the notion that the action commanded can be undertaken at the leisure of the subordinate party. Had Congress intended to provide the Government discretion as to when Section 1226(c)'s mandatory detention commences, it would not have used mandatory language. Instead, it would have enacted language such as "at any point after the alien is released" or "after the alien is released." The fact that no such language appears in the statute cannot be ignored. The Court cannot, and will not, strain to "read into" Section 1226(c) language that is simply not there, for to do so would be to contrive rather than to interpret. As it is written in Section 1226(c), "when . . . released" can be read only to mean at the time of release.

Second, reading Section 1226(c) as a single, cohesive sentence reveals that Congress had timing in mind when it enacted Section 1226(c). The "when . . . released" clause immediately precedes the clause "without regard to whether the alien is released on parole, supervised release, or probation." The nature of the individual's release—whether he or she is released on parole, supervised release, or probation—manifests at the moment of release. That Congress explicitly acknowledged events that occur *simultaneously* with an individual's release and stated that said events shall not bear on the Government's obligation to apprehend such individuals makes clear that said apprehension must occur at the moment the individual is released. Furthermore, the "when . . . released" command exists not only "without regard" to events that occur at the moment of release, such as the nature of that non-custodial release, but "without regard" to possible *future* events that have yet to manifest ("whether the alien may be arrested or imprisoned again for the same offense"). In this one sentence, Congress acknowledged both present and future possibilities and nonetheless required that the Attorney General "take into custody" such individuals "when [they are] released." Thus, by specifically choosing the word "when," as opposed to other terms such as "at any time after" or simply "after release," Congress emphasized that the directive was time-sensitive: the person must be taken into custody at the time of release from state custody and not at any point in time thereafter.

Third, that Section 1226(c) sets forth an immediacy requirement is further reinforced by assessing how Section 1226(c) interacts with the rest of Congress's

statutory scheme. In Section 1226, Congress set forth a statutory framework for the detention of noncitizens pending removal proceedings. Section 1226(c)'s mandatory detention provision is an exception within that broader scheme. The more generally applicable provision, Section 1226(a), affords the Government both deference and discretion as to whether an individual is either detained pending removal proceedings or released on bond. In contrast, the language of 1226(c) eliminates that discretion where a certain class of individuals are concerned. To find that the Attorney General has potentially boundless discretion as to when it discharges its obligations under Section 1226(c) runs counter to the language and structure of Section 1226. Indeed, it is illogical: both the language and structure of Section 1226 establish that Congress's directive to the Government regarding apprehension of certain criminal aliens was both time-sensitive and non-discretionary.

Given the interplay between Sections 1226(a) and (c), it makes sense that the plain language of the statute commands the Attorney General to apprehend specified criminal aliens "when [they are] released," and no later. The individuals defined in Section 1226(c)(1)(A) through (D) are those who have committed criminal offenses and for whom removal was Congress's priority. Congress enacted a statutory scheme that contemplated immediate apprehension of these individuals upon release from state custody, thus effecting a *seamless transition* and ensuring effective and efficient removal. Reading Section 1226(c) in a manner that credits its plain meaning serves this logical, sensible purpose.

The Government's three arguments to the contrary are unpersuasive. First, the Government proposes that the meaning of the phrase "when the alien is released" is ambiguous because it can be read to establish the point in time when the Government's duty to apprehend a criminal alien *begins*. (*See* Dkt. No. 24 at 14; Dkt No. 32 at 11.) Under the Government's reading of the statute, its authority to "take into custody" an individual contemplated in Section 1226(c) begins at the moment the individual is released from state custody and may be discharged at the Government's discretion. That reading of the statute strains credulity. It runs counter to both the plain meaning of the term "when" as used in Section 1226(c)(1) and the structure of Section 1226 as a whole. As set forth above, Congress chose the word "when," not the word "after" or something similar. If the Government's duty merely begins at the point of release, the Government is free to ignore Section 1226(c)'s mandate indefinitely. This interpretation finds no support in Section 1226(c)'s language or Section 1226 generally. Indeed, it appears that the Government's argument is motivated by the fact the Government finds it difficult to comply with Congress's directive. This concern is unavailing. Practical difficulties cannot change or undermine the statute's plain language.

Second, the Government argues that the meaning of "when" is imprecise, citing dictionaries to show that the term can take on various meanings. (*See* Dkt. No. 24 at 15; Dkt. No. 32 at 12.) To support this argument, the Government points to cases in which other courts have found that the term "when" has at least two possible meanings, such as "at any time after" and "immediately upon." Although a term may potentially

possess two meanings in other circumstances, it does not follow that the term therefore must be ambiguous as used in Section 1226(c). Such myopia has no place in statutory interpretation. A court must read the words of a statute "in their context and with a view to their place in the overall statutory scheme." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2001) (citations omitted); *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.") (citations omitted).

Courts have long employed the canon of looking to the words surrounding the term at issue and the statutory structure in which the term is used to discern meaning, for "a word is known by the company it keeps." This canon, also known as *noscitur a sociis*, prevents a court from "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Taking a full view of Section 1226(c), with particular attention to the structure of the sentence at Section 1226(c)(1) and the relationship between Sections 1226(a) and (c), it is evident that "when" can mean only "at the moment" of release. To hold otherwise would read "unintended breadth" into Section 1226(c) by sanctioning the Government's practice of delaying apprehension of criminal aliens for months, years, or even decades after they are released from state custody.

Third, as an alternative argument, the Government submits that the phrase "when . . . released" can-

not bear on the category of individuals subject to mandatory detention because those contemplated in subsection 1226(c)(1)(D) specifically would never have been subject to predicate custody. (Dkt. No. 32 at 13; Dkt. No. 45 at 1-2.). By extension, the Government posits that if the "when . . . released" requirement cannot apply literally to individuals falling within the scope of subsection (D), this Court should find that the "when . . . released" requirement applies to *no* individual contemplated in the entirety of Section 1226(c)(1)(A), (B), or (C). The argument does not convince, for it would have the effect of reading the "when . . . released" requirement out of the statute entirely. Moreover, the Government's suggestion that reading Section 1226(c) to require immediate apprehension would hamstring the Government's ability to detain individuals suspected of terrorist activity is unavailing as a practical matter. Section 1226(c) does not operate in a vacuum; there are other statutes that enable the Government to apprehend specifically individuals suspected of terrorist activities. *See, e.g.*, 8 U.S.C. § 1226(A) (entitled "Mandatory detention of suspected terrorists; habeas corpus; judicial review"). There is thus no practical concern that reading Section 1226(c) for what it says would render the Government unable to apprehend individuals contemplated by subsection (D).[6] In addition, it is not clear that reading Section

---

[6] The Government's suggestion that reading the statute for what it says would in some way hinder its ability to detain individuals for subsection (D) offenses pursuant to Section 1226(c) appears disingenuous in light of the fact that in response to the Court's order that the Government provide figures on the size of the potential class, the Government responded with data concerning individuals held pursuant to offenses enumerated in only subsections (A)

1226(c) for what it says presents an inherent contradiction by referring to subsection (c)(1)(D) individuals and requiring that there be predicate custody. Ostensibly, individuals falling within the ambit of subsection (D) could be subject to custody for an unrelated offense, serve time in state custody for that non-subsection (D) offense, and "when . . . released," be apprehended by the Government for activities falling under subsection (D). Thus, the Government's suggestion that there can be no sensible reconciliation of "when released" with the individuals contemplated by subsection (D) falls flat.

In sum, the Court finds that the plain reading of the statute supports Petitioners' interpretation. "When . . . released" means what it says: an individual falls within Section 1226(c) if detained at the time he or she is released from state custody. In so holding, the Court is in good company. Although the Ninth Circuit has yet to rule on this question, "[t]he majority of district courts in this [] circuit[] hold that the 'when . . . released' language is unambiguous," and that the mandatory detention provision applies to only individuals who have both committed an enumerated offense and are detained upon their release. *Deluis-Morelos v. ICE Field Office Dir.*, 2013 WL 1914390, at *4 (W.D. Wash. May 8, 2013); *see, e.g.*, *Khoury v. Asher*, No. 13-cv-1367, Dkt. No. 44 (W.D. Wash. Mar. 11, 2014); *Espinoza v. Aitken*, 2013 WL 1087492, at *6 (N.D. Cal. Mar. 13, 2013) (holding "when . . . released" lan-

---

through (C). The Government did not provide any figure reflecting the number individuals currently held under Section 1226(c) for subsection (D) offenses. (*See* Dkt. No. 46 ("Joint Submission") at 10.)

guage limits scope of mandatory detention provision to criminal aliens detained when released where detainee was arrested by ICE six months after conviction and sentence of probation and time served); *Bumanlag v. Durfor*, 2013 WL 1091635 (E.D. Cal. Mar. 15, 2013) (holding same where detainee was arrested by ICE seven years after release from prison); *Dighero-Castaneda v. Napolitano*, 2013 WL 1091230, at * 6 (E.D. Cal. Mar. 15, 2013) ("8 U.S.C. § 1226(c) does not apply unless the petitioner is taken into custody immediately or very shortly following his or her release from custody on the underlying removable offense."); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1229-30 (W.D. Wash. 2004) (holding same). Many courts outside this circuit have similarly found that the language "when . . . released" unambiguously requires an individual to have been detained upon release from criminal custody for an offense enumerated by Section 1226(c)(1) in order to be subject to mandatory detention under Section 1226(c). *See e.g.*, *Gordon v. Johnson*, 2013 WL 6905352 (D. Mass. Dec. 31, 2013); *Castaneda v. Souza*, 952 F. Supp. 2d 307, 317-318 (D. Mass. 2013); *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1264 (D. N.M. 2012) (collecting cases demonstrating that the "*majority* of federal district courts that have ruled on this issue have agreed that the language 'when the alien is released' in § 1226(c) unambiguously means immediately after their release" and have rejected the BIA's interpretation of § 1226(c) in *Matter of Rojas*) (emphasis in original); *Ortiz v. Holder*, 2012 WL 893154, *3 (D. Utah Mar. 14, 2012) (joining the "vast majority of federal courts that have addressed this issue" and holding that because petitioner was not tak-

en into immigration custody when he was released, Section 1226(c) does not apply).

Accordingly, for the reasons set forth above, the Court finds that Section 1226(c) unambiguously requires that individuals be detained immediately upon release from custody in order to be subject to Section 1226(c)(2)'s mandatory detention provision. If individuals are not detained "when [they are] released" from state custody, the Government may detain them pending removal proceedings pursuant to Section 1226(a), which requires that they be afforded a bond hearing.

3. Section 1226(c)'s Legislative History Confirms Its Plain Meaning

Although the Court's analysis can end at this juncture, it bears noting that the political context in which Section 1226 was enacted confirms that the plain language of the statute requires apprehension at the time of release and no later. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court considered the constitutionality of Section 1226(c)'s mandatory detention provision and provided a fulsome explication of the statute's origin. There, the Supreme Court found that Congress enacted Section 1226(c) "against a backdrop of wholesale failure by the [Immigration and Naturalization Service ("INS")][7] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518 (citing Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on In-

---

[7] On March 1, 2003, the INS ceased to exist as an independent agency within the Department of Justice, and ICE, an agency within DHS, assumed INS's detention and removal authority.

vestigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S. Rep. No. 104-48, p. 1 (1995) (confinement of criminal aliens alone cost $724 million in 1990)). Having undertaken to determine how to ensure that such individuals would assuredly be deported, Congress's investigations revealed infirmities in INS's processes. For example, Congress learned that "the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." *Demore*, 538 U.S. at 518 (emphasis in original) (citation omitted). The result was not simply a monetary cost on the Nation, but also a cost on other potential immigrants who sought to enter the United States and on the public due to the crimes such individuals committed before being removed. *Id.* The Supreme Court further noted that "deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 518-19 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). Given this context, it makes sense that Congress wanted to ensure that certain criminal aliens would not be released following time served for certain offenses. Reading Section 1226(c) for what is says furthers that goal by ensuring a seamless transition from state to federal immigration custody and ensuring efficient removal proceedings for certain offenders.

Cognizant that Section 1226(c)'s new seamless transition mandate would require the INS to change considerably its policies and procedures, Congress passed the Transition Period Custody Rules ("TPCR") concurrently with Section 1226(c). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009, 3009-586 (Sept. 30, 1996). The TPCR suspended the implementation of the mandate in Section 1226(c) for one year to provide the INS time to implement necessary changes. *See Matter of Garvin-Noble*, 21 I&N Dec. 672, 675, 678 (BIA 1997) ("Congress evidently preferred mandatory detention pending deportation but understood that detention space and other practical limitations temporarily stood in the way of that preference.")

In light of Congress's objectives in enacting Section 1226(c), specifically remedying the Government's failure to detain and remove a subset of criminal aliens, it is illogical to read Section 1226(c) as permitting potentially limitless delay in their apprehension. Doing so would have the practical effect of rendering the detention contemplated by Section 1226(c) discretionary in the first instance, for the Government could simply choose to delay apprehension indefinitely. Taken to its extreme, this reading of Section 1226(c) would effectively sanction the Government's "wholesale failure" to deal effectively with and remove criminal aliens. *See Demore*, 538 U.S. at 518. The one-year suspension of Section 1226(c) suggests all the more that Congress intended to require seamless transition from state to federal custody "when" such individuals are

released from state custody.[8] Congress's intent, evident from the plain language of the statute and reinforced by the context in which it was passed, was that Section 1226(c) would function as a mandate, effecting seamless transitions from custody to immigration detention for a select class of deportable persons for whom removal was Congress's priority.[9] The Gov-

---

[8] The Government argues that the TCPR provided the Government time to implement the processes required for Section 1226(c)'s mandatory detention requirement, not to perfect that process. The Government further argues that practical considerations, such as sanctuary city ordinances and limited federal resources, render seamless transition from state to federal custody difficult. These arguments are unavailing. As explained above, Congress made clear that the Government "shall take into custody" the individuals in question "when [they are] released." The fact that the Government fails to comply with this mandate is not a reason for this Court to interpret Congress's language as sanctioning such noncompliance.

[9] Indeed, after enacting Section 1226(c), Congress remained apprised the INS's efforts to identify and remove criminal aliens. To that end, the General Accountability Office provided reports and testimony. In 1997, the GAO provided to the House Committee on the Judiciary a report, entitled "Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved." GAO/T-GGD-97-154 (July 15, 1997). The GAO provided a follow-up to that report in 1998, entitled "Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement." GAO/GGD-99-3 (October 1998). And in 1999, the GAO provided testimony to the same effect. *See* GAO/T-GGD-99-47 (February 25, 1999) ("1999 Testimony"). Although these reports concerned primarily the INS's effectuation of Institutional Hearing Program procedures, whereby removal proceedings would be initiated and completed for criminal aliens while in state or federal custody, the reports are notable for their consistent acknowledgement of INS's chronic failure to even *identify* criminal aliens while they are in state custody in the first place, and furthermore, for INS's

ernment's inability to follow this mandate does not change the statute's plain language nor can it be a basis for broadening the Government's authority. To hold otherwise would not only do violence to the statute, it would have the perverse effect of validating the Government's failure to comply.

4. The Government's Remaining Arguments Do Not Persuade

a. *Matter of Rojas* does not merit any deference

Having found that Section 1226(c) is unambiguous, it thus follows that the BIA's decision upon which the Government relies, *Matter of Rojas*, merits no deference under *Chevron*. However, in the interest of clarity and completeness, the Court will now address the myriad other reasons why *Rojas* cannot stand.

As an initial matter, the BIA's framing of the question presented in *Rojas* differed from the question before this Court. In *Rojas*, the dispositive question was not whether the language "when the alien is released" in Section 1226(c) is ambiguous. To the contrary, BIA expressly concluded that the "when . . . released" language *was not* ambiguous: Section

---

failure to take said individuals into custody "upon their release from prison." (*See* 1999 Testimony at 2 ("As was the case when we reported to this Subcommittee in July 1997, we again found that INS . . . did not fully comply with the legal requirements that it . . . (2) take [criminal aliens who had committed aggravated felonies] into custody upon their release from prison"); *id.* at 6 ("INS still is not doing all it should to ensure that it is initiating removal proceedings for aggravated felons and taking them into custody upon their release from prison.") (*See also* Dkt. No. 39.)

1226(c) "does direct the Attorney General to take custody of aliens ***immediately upon their release*** from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis supplied). Instead, the BIA focused on the language of Section 1226(c)(2), which defines the category of persons to whom the mandatory detention provision applies, *i.e.*, as those "alien[s] described in paragraph (1)." Thus, the BIA sought to determine whether the "alien described in paragraph (1)" referred to: (1) individuals who have committed offenses enumerated in paragraphs (1)(A) through (1)(D), or (2) those same individuals but who were also detained "when . . . released" from state custody. *See Rojas*, 23 I. & N. Dec. at 125. The *Rojas* court opted for the former. *Id.* ("We construe the phrasing 'an alien described in paragraph (1),' as including only those aliens described in subparagraphs (A) through (D) of section 236(c)(1) of the Act, and as not including the 'when released' clause.").

A closer look at the analysis presented in *Rojas* reveals its infirmity. It is a "'cardinal principle of statutory interpretation' [] that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1995) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted); *Rojas*, 23 I&N at 134 (Rosenberg, J., dissenting) (citing *Menasche*, 348 U.S. 528). While the *Rojas* majority recognized that the phrase "when . . . released" created an immediacy requirement, it then read that requirement out of the statute entirely. *See Rojas*, 23 I. & N.

Dec. at 125. In so doing, the BIA rendered the "when . . . released" clause entirely superfluous.

As explained above, the structure of Section 1226(c) does not support the notion that the "when . . . released" clause is an excisable part of the statute. "Paragraph 1" is only one sentence long; "when . . . released" is an inextricable part of the sentence. The task of interpreting a statute does not present an opportunity for a reviewing body to determine which of Congress's words are necessary and which may be ignored. All of Congress's words are assumed to serve a purpose; it is the Court's role to determine what those words mean. Where, as here, the BIA found the terms "when . . . released" to have one clear meaning—to provide a mandate that the Attorney General apprehend a class of individuals ***immediately upon their release*** from criminal confinement—the BIA was not free to find the "when released" language unnecessary and thereby administratively eviscerate Congress's mandate.

For good reason, the cases that rely upon *Rojas* are few. The most prominent of these is the Fourth Circuit decision, *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012). There, in a short decision, the Fourth Circuit referred to a dictionary definition of the word "when" and concluded that because the term in isolation can be read to have different meanings, it therefore was ambiguous as used in Section 1226(c). *See Hosh*, 680 F.3d at 379-80 ("'[W]hen' in § 1226(c) can be read, on one hand, to refer to 'action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun.'" *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (citing 20 *The Oxford English Diction-*

ary 209 (2d ed. 1989); *The American Heritage Dictionary of the English Language* (4th ed. 2000)). On the other hand, 'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that . . . . ' *Free Merriam-Webster Dictionary, available at* http://www.merriam-webster.com/dictionary/when (last visited April 30, 2012).."). It therefore deferred to the BIA's interpretation.

The Fourth Circuit decision did not examine the structure of Section 1226(c) and the meaning of the word "when" in that context, or the relationship between the mandatory detention requirements set forth in Section 1226(c) and the permissive detention requirements set forth in Section 1226(a). *Cf. Brown & Williamson*, 529 U.S. at 132-33. Nor did the Fourth Circuit evaluate the nature of the BIA's reasoning in *Rojas*, its application of canons of statutory interpretation, or its concession that the term "when . . . released" was *not* ambiguous. *See Bogarin-Flores v. Napolitano*, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012) (finding *Hosh* unpersuasive as it failed to "present any independent reasoning or statutory construction"); *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) ("Presumably because of the inadequacy of the analysis in *Rojas* and the dearth of analysis in *Hosh* itself, *Hosh* has had little persuasive impact beyond the Fourth Circuit . . . . ").

Accordingly, the Court declines to accord persuasive weight to *Hosh*, and rejects *Rojas* as inconsistent with Section 1226(c)'s plain language and as an unreasonable application of the canons of statutory construction.

b. The "loss of authority" doctrine does not apply

Other courts have reached the same practical conclusion as *Rojas* but on different grounds. The Third Circuit's ruling in *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) is the most prominent. There, citing the Supreme Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), the Third Circuit avoided the need to determine whether Section 1226(c) contained any ambiguity by relying on the "loss of authority" doctrine to find that the Government does not lose its authority to detain individuals under Section 1226(c) even if it fails to detain them "when . . . released." *See Sylvain*, 714 F.3d at 157 ("We need not take a stand on this issue. Even if the statute calls for detention 'when the alien is released,' and even if 'when' implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay."); *see also Hosh*, 680 F.3d at 381-82 (noting that although the statute was ambiguous and the BIA's decision correctly decided, even were it not so, the Government would retain its authority to apprehend an individual long after the date of release from custody under the "loss of authority" doctrine). Thus, these courts have found that the Government's obligation to apprehend an individual who has committed an offense enumerated in Section 1226(c)(1)(A)-(D) may be discharged at any point after the individual is released.

As an initial matter, it bears noting that the application of this doctrine effectively "reads out" of the statute the "when . . . released" language, which for all the reasons explained above is an undesirable result.

But beyond that, the case upon which the Government relies, *Montalvo-Murillo*, is distinguishable and therefore inapplicable to the question at hand. In *Montalvo-Murillo*, the Supreme Court addressed whether the Government lost authority to seek pretrial detention of an individual pending his criminal trial if it did not timely request a hearing. 495 U.S. at 713-14. There, a magistrate judge ordered the criminal suspect released on bond. After a *de novo* detention hearing, the district court disagreed and found that the suspect was a flight risk. The district court nevertheless ordered the suspect released because the detention hearing had not been held "upon the person's first appearance," as required by the Bail Reform Act of 1984. 18 U.S.C. § 3142(f) (West 1990).[10] The Tenth Circuit affirmed, and the Supreme Court reversed.

---

[10] The relevant language from the Bail Reform Act at issue in *Montalvo-Murillo* was as follows:

> **(e) Detention.** If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.
>
> * * *
>
> **(f) Detention hearing.** The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—
>
> * * *

The Supreme Court found that although there was a "vital liberty interest" at stake, "the Act is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained." *Montalvo-Murillo*, 495 U.S. at 716-17. Accordingly, the Court held that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged." *Id.* at 717. In so holding, the Court relied on the "'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Id.* at 718 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (quotation marks omitted)).

Unlike the facts of the instant case, the circumstances of *Montalvo-Murillo* created a stark choice: finding that the government's authority to detain expired if the statutory timeline was missed would result in release of an individual who had been deemed a flight risk. The public would bear the cost of the Government's delay, and that cost would be substantial. But unlike the Bail Reform Act provision in *Montalvo-Murillo*, Section 1226 does not lack for a remedy in the event that the Government fails to apprehend an indi-

---

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.

18 U.S.C. § 3142(e)-(f) (West 1990)); *see Gutierrez v. Holder*, 2014 WL 27059, at *5-6.

vidual "when [he or she is] released" from state custody as required under Section 1226(c). In the event that the Government fails to apprehend an individual promptly, the individual does not automatically become "immune from detention." *Compare Montalvo-Murillo*, 495 U.S. at 722. Rather, the individual remains subject to detention pursuant to Section 1226(a), which entitles him or her to a bond hearing. Thus, the Government retains its ability to detain individuals like Petitioners, it simply has to afford them a bond hearing as required by Section 1226(a). If determined to be a flight risk or a threat to public safety, detention pending removal proceedings remains proper; there is no "threat that we must embarrass the system by releasing a suspect certain to flee from justice." *See id.* at 721.

The Government argues that if Section 1226(c) is read to require that the Government effect a seamless transition from federal to state custody, Petitioners would receive the undue "windfall" of a bond hearing. The Government further argues that holding the Government to the immediacy requirement in Section 1226(c) would effect a sanction on the public. These arguments are unpersuasive. Providing such individuals a bond hearing can hardly be said to constitute a "windfall." First, affording a bond hearing *is* the general rule; the lack thereof pursuant to Section 1226(c) is the exception. Second, the Ninth Circuit has held that individuals such as Petitioners must receive a bond hearing after six months of detention *even if they are properly detained* pursuant to Section 1226(c). *See Rodriguez II*, 715 F.3d at 1138. Third, it cannot be seriously argued that requiring the Government to provide individuals such as Petitioners bond hearings

impinges the public interest. The individuals at issue will not be released unless they can demonstrate that they are not a flight risk or danger to the public.[11]

* * * *

For all the reasons set forth above, the Court holds that the "when . . . released" clause of Section 1226(c) means what it says. Individuals who have committed an offense enumerated at Section 1226(c)(1)(A)-(D) must also be detained by the Government at the time they are released from criminal custody in order to be subject to the mandatory detention provision in Section 1226(c)(2). The Government's practice of subjecting to mandatory detention individuals who were not apprehended when released from state custody runs afoul of Congress's clear command.

The parties having conceded that their respective motions rise and fall with the resolution of this critical issue, Petitioners' Motion for Preliminary Injunction is granted and the Government's Motion to Dismiss is

---

[11] According to the parties' Joint Submission following oral argument, ICE currently detains between 200 and 300 individuals under Section 1226(c) in the prospective class who were not transferred directly from criminal custody into immigration detention for the crime(s) for which they are removable under subparagraphs (A) through (C). The Court notes that this figure does not account for any individuals held under subparagraph (D). (*See* Joint Submission at 10.) Further, according to the Declaration of Michael Tan, counsel for petitioners in *Rodriguez v. Robbins*, Case No. CV-07-3239, in a one-month period following issuance of an injunction in that case, the Government held 171 bond hearings. (Dkt. No. 47, Ex. A at 3.)

denied. The Court now considers Petitioners' Motion for Class Certification.

IV. MOTION FOR CLASS CERTIFICATION

Petitioners seek to certify as a class:

> Individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense.

(*See* Dkt. No. 8 at 1; Dkt. No. 47 at 9-10.)[12] Petitioners also ask that they be named as representative plaintiffs and that their counsel be appointed class counsel.

A. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)) (internal quotation marks omitted). The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four require-

---

[12] The proposed class does not include individuals in custody for Section 1226(c) offenses who were transferred to criminal custody outside the state of California, nor does it include individuals held outside the state of California under the authority of ICE field directors in the state of California, because such individuals are not, or have not yet been, detained in immigration custody in California pursuant to Section 1226(c). (Dkt. No. 47 at 9-10.) Nor does it include individuals detained pursuant to Section 1226(c) who were not apprehended immediately upon release from custody but who have already been afforded bond hearings.

ments of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the three requirements under Rule 23(b) are met. *Wal-Mart*, 131 S. Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). While the Court retains broad discretion to certify a class, the Court must conduct a "rigorous analysis" to confirm that the plaintiff has in fact established the requirements of Rule 23 to ensure that a departure from the general rule of individual litigation is justified. *General Tel. Co. v. Falcon*, 457 U.S. 147, 160-61 (1982). "While ordinarily disfavored, the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus." *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("*Rodriguez I*") (citations omitted).

In order to certify a proposed class, the Court must find that the moving party has complied with the prerequisites of both subparts (a) and (b) of Fed. R. Civ. P. Rule 23. The Court addresses each part in turn.

B. Application of Rule 23(A)

1. Numerosity

Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement if "the class is so large that joinder of all members is impracticable." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also Davis v. Astrue*, 250 F.R.D. 476, 485 (N.D. Cal. 2008) ("As a general rule, classes numbering greater than 41 individuals satisfy the numerosity

requirement.") (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.22 [1] [b] (3d ed. 2004)).

The numerosity requirement has been met in this case. The Government concedes that ICE currently detains between 200 and 300 individuals in California pursuant to Section 1226(c) who were not detained by ICE immediately upon release from criminal custody for their 1226(c)(1) offenses. (*See* Joint Submission at 10.) Thus, the Court finds that Petitioners have satisfied Rule 23(a)(1)'s numerosity requirement. *See Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008) (finding numerosity requirement satisfied where plaintiffs only identified 22 potential class members); *Santillan v. Ashcroft*, 2004 WL 2297990, at *9 (N.D. Cal. Oct. 12, 2004).

2. Commonality

"Commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (citation and quotation marks omitted). "Rule 23(a)(2) has been construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[T]he key inquiry is not whether the plaintiffs have raised common questions . . . but rather, whether class treatment will 'generate common *answers* apt to drive the resolution of the litigation.'" *Abdullah*, 731 F.3d at 957 (quoting *Wal-Mart*, 131 S. Ct. at 2551). "This does not, however, mean that *every* question of law or fact must be common to

the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Id.* (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 582, 589 (9th Cir. 2012)).

The Court finds that Petitioners have demonstrated sufficient commonality to satisfy Rule 23(a)(2) because the resolution of one single question—whether Section 1226(c) requires immediate detention by ICE or whether Section 1226(c) permits the Government's practice of delaying apprehension—will resolve "in one stroke" all class members' claims. *See Rodriguez I*, 591 F.3d at 1122-24 (finding commonality even though class members were detained pursuant to different statutes and under different factual circumstances because a single question—whether a bond hearing was required for individuals detained longer than six months—was "posed by the detention of every member of the class and their [individual claims would] largely be determined by its answer"). As Petitioners argue, and as the Government conceded at the hearing on these motions, this Court's decision on the merits of Petitioners' statutory interpretation claim would effectively and efficiently resolve the claims of all potential class members "in one stroke." Further, in keeping with the purpose of class action litigation, settling this common question would "render management of [proposed members'] claims more efficient for the courts" and "would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone." *Rodriguez I*, 591 F.3d at 1123.

3. Typicality

"The typicality requirement looks to whether the claims of the class representatives are typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez I*, 591 F.3d at 1124 (citation and internal quotation marks omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (quotation omitted). "Where the challenged conduct is a policy or practice that affects all class members . . . the cause of the injury is the same"; thus, the analysis requires "comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class." *Davis*, 275 F.3d at 868-69.

The Court finds the typicality requirement satisfied. All class members were detained pursuant to Section 1226(c) and therefore denied individualized bond hearings despite the existence of a gap between their release from state custody and federal detention. (Dkt. No. 8 at 12-13.) Petitioners' claims are typical of those

of the potential class members, as both Petitioners' claims as well as those of the proposed class result from the Government's alleged misapplication of Section 1226(c). The injury alleged—detention without a bond hearing pursuant to Section 1226(c) despite the fact that Petitioners were not detained immediately upon release—is the same injury suffered by all of the proposed class members. The remedy sought—a declaration by this Court that Section 1226(c) requires immediate detention and an order granting bond hearings for class members—is a remedy all class members share.

The Government's counterarguments are unavailing. The differences in each Petitioner's gap between release and detention, legal non-citizen status, and challenges each class member may face in a bond hearing are irrelevant to the analysis because "[t]he particular characteristics of the Petitioner[s] or any individual detainee will not impact the resolution of [the] general statutory question and, therefore, cannot render Petitioners' claim atypical." *Rodriguez I*, 591 F.3d at 1124; *see also Santillan*, 2004 WL 2297990, at *11 (noting that the relative differences in time that class members had to wait for the Government to process immigration status updates were "immaterial for purposes of class typicality, which is concerned with the class members' shared interests and harms") (citing *Falcon*, 457 U.S. at 156).

4. Adequacy of Class Representation

"To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020. "To determine

whether named plaintiffs will adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citation and quotation marks omitted). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products*, 521 U.S. at 625-26 (internal quotation marks omitted).

The Government does not contest that Petitioners and their counsel will prosecute the action vigorously. Rather, the Government focuses on the first prong and argues that Petitioners are not adequate representatives because their interests conflict with those of potential class members. (Dkt. No. 25 at 12.) The Court disagrees.

Typically, conflicts of interest arise in situations where one group of class members seeks relief that would not benefit, or would be to the detriment of, other class members. *See Amchem Products*, 521 U.S. at 625-27 (finding a conflict of interest where a single class included one group of class members who sought immediate settlement payments to be derived from the same fund that would provide for other members who sought future payments). Here, despite the Government's assertions that the hypothetical differences between Petitioners and potential class members, the Court finds that there is no conflict of interest that would prevent Petitioners from adequately representing the class. Petitioners' statutory interpretation

claim does not depend on the length of time between Petitioners' release and detention; Petitioners' claim concerns pure statutory interpretation. Petitioners here seek injunctive and declaratory relief that would benefit all proposed class members. *See Santillan*, 2004 WL 2297990, at *12. A decision on the merits that the Government's interpretation of Section 1226(c) is incorrect and that the class members are entitled to bond hearings would benefit all proposed class members. *See also Rodriguez I*, 591 F.3d at 1125 (certifying class consisting of aliens indefinitely detained without bond hearings pursuant to several immigration laws). Accordingly, the Court finds that Petitioners have satisfied Rule 23(a)(4).

C. APPLICATION OF RULE 23(b)

In addition to satisfying the Rule 23(a) requirements, Petitioners must establish that the proposed class meets the requirements of one class type described in Rule 23(b). FED. R. CIV. P. 23(b)(1)-(3). Petitioners seek certification as a Rule 23(b)(2) class.

To certify a 23(b)(2) class, the Court must find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Ordinarily, it follows that there is no need "to undertake a case-specific inquiry into whether class issues must predominate or whether class action is the superior method of adjudicating the dispute" as necessary for the other subsections of Rule 23(b). *Wal-Mart*, 131 S. Ct. at 2558. Rather, "[p]redominance and superiority are self-evident." *Id.*

The Government does not contest that it has acted or refused to act on grounds that apply generally to the class. Nor does the Government contend that the Rule 23(b)(2) class-type is inappropriate in this action. Nonetheless, the Court has undertaken a "rigorous analysis" to ensure the requirement is met.

The Court finds that the proposed class meets the Rule 23(b)(2) requirements. Petitioners and proposed class members have been detained and held without bond hearings pursuant to Section 1226(c) despite the fact that they were not detained immediately "when . . . released" from state custody. Thus, there is no question that Petitioners challenge a uniform Government policy that applies generally to the class, thereby satisfying the first part of Rule 23(b)(2). *See Rodriguez I*, 591 F.3d at 1126 (certifying 23(b)(2) class seeking to challenge government policy of indefinite detention of aliens, finding it sufficient that "class members complain of a pattern or practice that is generally applicable to the class as a whole") (citation omitted). As for relief, Petitioners seek a declaration that Section 1226(c) requires immediate detention upon release from predicate custody and injunctive relief in the form of bond hearings for class members. Because Petitioners seek only injunctive and declaratory relief and a single remedy would provide relief for each class member, the proposed class is appropriate for 23(b)(2) certification. *See Wal-Mart*, 131 S. Ct. at 2557 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."); *Rodriguez I*, 591 F.3d at 1126 ("[A]ll class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude that the proposed class meets the

requirements of Rule 23(b)(2)."). Thus, the Court finds that Petitioners satisfy the requirements of Rule 23(b)(2).

V. CONCLUSION

For all the reasons set forth above, the Court finds that the Government's practice of subjecting to mandatory detention individuals who have committed an offense enumerated at Section 1226(c)(1)(A)-(D) but who were not apprehended "when released" from state custody violates the plain language of Section 1226(c). Petitioners' Motion for Preliminary Injunction is **GRANTED**. The Government's Motion to Dismiss is **DENIED**. Furthermore, Petitioners' Motion for Class Certification is **GRANTED**.

Accordingly, the Court **ORDERS** as follows:

Within 7 days of the entry of this Order, the parties shall provide to the Court either: (1) a joint proposed Redetermination Notice form, or (2) their individual proposed Redetermination Notice forms. Such proposed notices shall include a statement in plain language that the individual has been reevaluated and is no longer subject to mandatory detention pursuant to Title 8 U.S.C. section 1226(c). The notices shall further include in plain language the result of the non-citizen's custody reevaluation and whether the Department of Homeland Security ("DHS") has determined that the individual should be released on his own recognizance, on Intensive Supervision Appearance Program, or on bond, and if on bond, the amount of the bond that DHS has set. Such notices shall be accompanied by an I-286 Form as well as instructions for requesting a hearing to challenge DHS's custody reevaluation through a bond hearing pursuant to Title

8 U.S.C. section 1226(a), and also notify the individual that should he or she not specifically request a bond hearing, one will be automatically scheduled unless he or she affirmatively declines to have a bond hearing.

IT IS SO ORDERED.

Date: **May 15, 2014**

/s/ **YVONNE GONZALEZ ROGERS**
YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C13-1367RAJ

BASSAM YUSUF KHOURY, ET AL., PLAINTIFFS

v.

NATHALIE ASHER, ET AL., DEFENDANTS

[Filed: Mar. 11, 2014]

ORDER

Honorable RICHARD A. JONES

I. INTRODUCTION

This matter comes before the court on three motions: Plaintiffs' motion to certify a class, their motion for a preliminary injunction on behalf of that class, and Defendants' motion to dismiss for failure to state a claim. Although the parties requested oral argument, oral argument is unnecessary as to the rulings the court makes in this order. For the reasons stated below, the court GRANTS Plaintiffs' motion for class certification (Dkt. # 2) and DENIES Defendants' motion to dismiss (Dkt. # 28). The court directs the clerk to TERMINATE Plaintiffs' motion for a preliminary injunction. Dkt. # 14. The parties shall meet and confer in accordance with this order to determine if

Plaintiffs are satisfied that the declaratory relief that the court issues today will suffice to afford complete relief to Plaintiffs and the class they represent. If necessary, the court will conduct a hearing to determine whether to impose a permanent injunction to ensure that Defendants heed the court's declaratory ruling.

II. BACKGROUND

A. Plaintiffs Were Each Subject to Mandatory Detention As a Result of the Department of Homeland Security's Interpretation of 8 U.S.C. § 1226(c).

The federal government routinely locks away certain aliens who are in removal proceedings, denying them bond hearings via the so-called "mandatory detention" authority in a provision of the Immigration and Naturalization Act ("INA"). 8 U.S.C. § 1226(c)(2). Department of Homeland Security ("DHS") officials arrest these aliens; the Department of Justice immigration courts who oversee the confinement of aliens deny them bond hearings. In the government's view, an alien who has committed an offense on a list at § 1226(c)(1) is subject to mandatory detention pending the resolution of removal proceedings. There can be no serious question that some of these aliens present no risk to their communities and no risk of flight, because some of them have been living in this country for decades and have families and careers. What the government thinks about a law that locks away peaceable family members without release, the court can only guess. What is certain is that the government takes the position that Congress tied its hands when it enacted the mandatory detention scheme. It asserts that it *must* detain these aliens without bond, regardless of whether that is remotely sensible immigration policy. But this

case is not about whether mandatory detention makes sense; it is about whether the government properly interprets the detention mandate of § 1226(c). The government's interpretation follows the interpretation of the Board of Immigration Appeals ("BIA") in *In re Rojas*, 23 I. & N. Dec. 117, 125 (BIA 2001), where the BIA determined that any alien who had committed a listed offense was subject to mandatory detention pending the completion of removal proceedings.

The Plaintiffs in this case are aliens who DHS locked away in the Northwest Detention Center ("NWDC"), an alien detention facility located in this judicial district. DHS locked Bassam Yusuf Khoury away in April 2013, and did not release him on bond until October 2013. DHS locked Alvin Rodriguez Moya away in April 2013, and did not release him on bond until October 2013. DHS locked Pablo Carrera Zavala away in April 2013 and released him on bond in August 2013 after it decided that he was not actually subject to mandatory detention. Asher Decl. (Dkt. # 36-1) ¶ 9. DHS commenced removal proceedings for each Plaintiff at about the time it took them into custody. So far as the court is aware, those proceedings have not reached a resolution even though they have been pending for nearly a year.

At the risk of understatement, the court observes that locking people up without bond hearings presents substantial Due Process concerns. The Supreme Court has held that the mandatory detention scheme of § 1226(c) is not a per se violation of the Due Process Clause of the Fifth Amendment. *Demore v. Kim*, 538 U.S. 510, 531 (2003). The Court grounded its holding, however, in its view that the average period of

mandatory detention would be six weeks (the average time to complete removal proceedings in which the alien did not appeal) or "about five months" (in the event that the alien appealed an adverse removal ruling). *Id.* at 530. In *Rodriguez v. Robbins*, 715 F3d 1127, 1137 (9th Cir. 2013), the court detailed Ninth Circuit rulings establishing that "*Demore*'s holding is limited to detentions of brief duration." In light of those rulings, the *Rodriguez* court upheld an injunction requiring aliens subject to mandatory detention within the Central District of California to receive a bond hearing within six months, and to be released on bond unless the government demonstrates that the alien presents a danger to the community or a risk of flight. *Id.* at 1131. It the government's apparent deference to *Rodriguez* and the precedent cited therein that allowed Mr. Khoury and Mr. Rodriguez to win release on bond after six months of mandatory detention.

Release after six months of mandatory detention is better than no release at all, but Plaintiffs argue that it is unlawful nonetheless. To understand their argument and the government's counterargument, the court considers in detail Plaintiffs' encounters with the mandatory detention scheme of § 1226(c).

Each Plaintiff committed a state crime, was convicted, and served his sentence. Each was released. Each returned to his family and community. Each was arrested years later by agents from Immigration and Customs Enforcement ("ICE"), an agency within DHS. Mr. Khoury, a native of Palestine and lawful permanent resident of the United States since 1976, was released from state custody in June 2011 after serving a 30-day sentence on a drug charge. ICE

agents arrested him in April 2013. Mr. Rodriguez, a native of the Dominican Republic and a lawful permanent resident of the United States since 1995, served the non-suspended portion of a three-year sentence on a drug charge and was released in August 2010. ICE agents arrested him in April 2013. Mr. Carrera, a native of Mexico who has lived in the United State since 1998, finished a 60-day sentence in February 2003. ICE agents arrested him in April 2013.

No one disputes, at least for purposes of this case, that Plaintiffs were deemed removable for committing crimes within the scope of 8 U.S.C. § 1226(c), the subsection of the INA that authorizes mandatory detention. Congress amended § 1226 as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. In section 303 of that Act, it revised the existing detention scheme for aliens subject to removal and imposed a mandatory detention requirement for some of those aliens. It allowed for a transition period to implement mandatory detention. After two years in which the government operation under transitional rules, § 1226(c) took effect in 1998. *Saysana v. Gillen*, 590 F.3d 7, 10 n.2 (1st Cir. 2009). Its first paragraph provides as follows:

> (1) Custody
>
> The Attorney General[1] shall take into custody any alien who—

---

[1] The Secretary of Homeland Security is now the official who bears the duties that Congress assigned to the Attorney General in § 1226(c). *See* 6 U.S.C. § 557 (describing catchall transfer-of-duty to Secretary of Homeland Security in the wake of the creation of that Department).

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), A(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

That Mr. Rodriguez and Mr. Khoury committed an offense listed in subparagraphs (A) through (D) is not in dispute, at least not in this case. DHS's initial determination that Mr. Carrera committed one of those offenses was apparently an error, albeit one that DHS did not correct until Mr. Carrera had been confined for four months.

The first paragraph of § 1226(c) does not mandate detention without bond. The next paragraph does, at least in some circumstances:

> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides [that the alien's release is necessary to protect a witness in a major criminal investigation].

In other words, unless he meets an exceedingly narrow witness-protection exception that is not at issue in this case, every alien "described in paragraph (1)" is statutorily ineligible for release from DHS custody in advance of the resolution of his removal proceedings.

By contrast, § 1226 ensures that all aliens who are not "described in paragraph (1)" are eligible for release on bond. Its first paragraph declares that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States," but elaborates that "except as provided in subsection (c)," aliens detained pending removal may be released on bond or conditional parole. § 1226(a)(2).

Plaintiffs contend that they are not subject to mandatory detention because they are not aliens "described in paragraph (1)" because ICE agents took them into custody well after their release from state custody, not "when [they were] released," as paragraph (1) requires. In their view, mandatory detention in accordance with § 1226(c)(2) is available only for aliens who have committed an offense described in paragraphs (A) through (D) *and* who were taken into ICE custody immediately upon their release from state custody. DHS disagrees, taking the position that § 1226(c) mandates detention of any alien who committed an offense de-

scribed in paragraphs (A) through (D), regardless of when ICE took the alien into custody.

B. Plaintiffs' Statutory Interpretation Claim Is Ripe for a Final Ruling.

Before considering the merits of each party's interpretation of § 1226, the court reviews the procedural posture of this action.

Plaintiffs sued the Secretary of Homeland Security, a host of ICE officials responsible for detaining aliens in the Western District of Washington, and the warden at the NWDC. In addition, they sued the Attorney General in his capacity as head of the Department of Justice, as well as the Director of the Executive Office for Immigration Review ("EOIR"). The EOIR encompasses both the BIA, which is the Justice Department agency responsible for interpreting and applying immigration laws, as well as the immigration courts who preside over alien bond hearings. The Department of Justice and EOIR are Defendants because they abet DHS's execution of its interpretation of mandatory detention. Although aliens in mandatory detention are not entitled to bond hearings, they may receive hearings before an immigration judge where they can contest whether they are properly subject to mandatory detention. 8 C.F.R. § 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999) (explaining that the "purpose of the regulation . . . is to provide an alien . . . with the opportunity to offer evidence and legal authority on the question whether [DHS] has properly included him within a category that is subject to mandatory detention"). Each of the three Plaintiffs appeared at this hearing, each argued that he was not subject to mandatory

detention because DHS did not take him into custody when he was released from state custody, and each received a ruling from an immigration judge that he was nonetheless subject to mandatory detention. Throughout this order, the court uses the term "the government" to apply to Defendants collectively.

Plaintiffs styled their suit as both a petition for writs of habeas corpus on their own behalf and as a suit for declaratory and injunctive relief not only on their own behalf, but on behalf of a class of all aliens who are or will be detained without bond as a result of the government's expansive view of § 1226(c) mandatory detention. They stated two claims for relief: one that the government violates § 1226(c) by subjecting them to mandatory detention; and one that mandatory detention, as the government envisions it, violates the Due Process Clause.

Plaintiffs have not only filed a motion to certify that class, but also a motion for a preliminary injunction that would require the government to provide bond hearings in accordance with § 1226(a) within 30 days of an alien's arrest. A motion for a preliminary injunction requires, among other things, that the Plaintiffs demonstrate that they are likely to succeed on the merits of their claims. The government, not content simply to argue in opposition to the injunction motion that Plaintiffs are unlikely to succeed on the merits, filed a motion to dismiss Plaintiffs' suit for failure to state a claim. Plaintiffs countered by moving for summary judgment and a permanent injunction. The government was prepared to file a cross-motion for summary judgment before the parties reconsidered their more-motions-are-better approach. They agreed that

this case turns not on disputed facts, but on a "pure question of law"—specifically the interpretation of § 1226(c). Gov't Mot. (Dkt. # 37) at 3. The parties further agreed that unless the court found a dispute of material fact, it could enter permanent injunctive relief if it resolved that pure question of law in Plaintiffs' favor. Oct. 7, 2013 ord. (Dkt. # 38).

The parties focus virtually all of their attention on Plaintiffs' claim that DHS misinterprets § 1226(c). In their motion to dismiss, Defendants made a cursory effort to target Plaintiffs' Due Process claim, contending that *Demore* has put that claim to rest. Plaintiffs scarcely responded. Although the parties were never explicit, it is possible that their agreement to focus on the "pure issue of law" that their statutory interpretation dispute raises represents an agreement to leave Plaintiffs' Due Process claim for another day. In any event, the parties have done so little to address that claim that the court will not address its merits. For the remainder of this order, the court will ignore Plaintiff's Due Process claim and treat this case as if it raised only a challenge to the government's interpretation of § 1226(c). This order will conclude with instructions to Plaintiffs to indicate whether they still wish to pursue their Due Process claim.

The procedural route to relief thus cleared of obstacles, the court now turns to the issue at the heart of this case: does § 1226(c) permit the government to subject to mandatory detention aliens who it arrested months, years, or (in Mr. Carrera's case) more than a decade after their release from state custody?

III. ANALYSIS

A. Section 1226(c)(2) Unambiguously Conditions Mandatory Detention on DHS Custody That Commences Immediately Upon the End of Non-DHS Custody.

The interpretation of a statute is a question of law whose answer begins with an examination of the plain meaning of the statute. *United States v. Gomez-Osorio*, 957 F.2d 636, 639 (9th Cir. 1992). Words in a statute take on their "ordinary, contemporary, common meaning," unless the statute otherwise defines them. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) (citation omitted). The court must read the words of a statute "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2001); *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole."). If the statutory language is unambiguous, and the statutory scheme is coherent and consistent, that is the end of the court's interpretative inquiry. *Miranda*, 684 F.3d 844, 849 (9th Cir. 2012). The parties debate to what extent the court must defer to the BIA's interpretation of § 1226(c) in *Rojas*. But it is settled that a court owes no deference to any agency's statutory interpretation unless the statute fails to clearly express the intent of Congress. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

There are two potential ambiguities in § 1226(c). One is the meaning of the phrase "when the alien is released" in § 1226(c)(1). That phrase might mean something akin to "at the moment of release." It might also mean "at any time after release." The other potential ambiguity arises from the interrelationship of paragraphs (1) and (2) of § 1226(c). Paragraph (2), which is the sole authority for mandatory detention, applies only to "an alien described in paragraph (1)." If an alien "described in paragraph (1)" is merely an alien who has committed one of the offenses listed in subparagraphs (1)(A) through (1)(D), then mandatory detention is available regardless of when DHS takes an alien into custody. That was the view of the BIA in *Rojas*. But if an alien "described in paragraph (1)" is an alien who has both committed one of the enumerated offenses *and* has been taken into DHS custody "when . . . released" from non-DHS custody, the timing of the DHS arrest (and the meaning of "when . . . released") is critical to determining whether the alien is subject to mandatory detention. As the court will soon discuss, neither of these potential ambiguities is an actual ambiguity: the meaning of both phrases is plain in the context of § 1226.

1. No Binding Precedent Dictates this Court's Interpretation of § 1226(c), But Many Courts Have Considered the Issue.

In considering these potential ambiguities, the court does not write on a blank slate. The Ninth Circuit, unfortunately, has yet to interpret § 1226 in a manner that bears on its interpretation in this case. Three other federal appeals courts have. Two of them, in turn, have at least acknowledged the BIA's 2001 inter-

pretation in *Rojas*. There, a majority of the en banc BIA concluded that the phrase "an alien described in paragraph (1)" includes only those aliens described in subparagraphs (1)(A) through 1(D). 23 I. & N. Dec. at 125. The BIA did not decide what "when . . . released" means.

In *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012), the Fourth Circuit purported to defer to the BIA's interpretation of § 1226 in *Rojas*. But it did not. Instead, it interpreted the meaning of "when the alien is released," concluding that although the command to arrest certain criminal aliens "'when . . . released' from other custody connotes some degree of immediacy," it could not "conclude that Congress clearly intended to exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into federal custody." *Id.* at 381 (emphasis in original). Alternatively, the *Hosh* court concluded that even if it were to interpret "when . . . released" more stringently, § 1226(c) specifies no consequence for a failure to arrest an alien "when . . . released," and thus does not prohibit mandatory detention for qualifying aliens arrested after their release from non-DHS custody. *Id.* at 381 ("[E]ven if we assume that the statute commands federal authorities to detain criminal aliens at their exact moment of release from other custody, we still conclude that a criminal alien who is detained *after* that exact moment is not exempt from mandatory detention.") (emphasis in original).

In *Sylvain v. Attorney General of the United States*, 714 F.3d 150 (3d Cir. 2013), the Third Circuit focused its attention on whether § 1226(c) conditions mandatory

detention on the timing of an alien's arrest. It concluded that it does not. *Id.* at 157 ("Even if the statute calls for detention 'when the alien is released,' . . . nothing in the statute suggests that immigration officials lose authority if they delay."). It noted that the *Hosh* court had not deferred to the BIA's interpretation of "an alien described in paragraph (1)" in *Rojas*, and had instead crafted its own interpretation of "when . . . released" in § 1226(c)(1). *Sylvain*, 714 F.3d at 157 n.9.

Before *Sylvain* and *Hosh* addressed the issue at the heart of this case, the First Circuit addressed a different interpretative question arising from § 1226(c) in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009). The *Saysana* court rejected the BIA's determination that an alien released from custody for an offense described in subparagraphs (1)(A) through (1)(D) *before* the effective date of § 1226(c) could nonetheless be subject to mandatory detention if he was released *after* the effective date from custody for an offense beyond the scope of those subparagraphs. *Id.* at 18. As the court will later discuss, in reaching that conclusion, the *Saysana* court interpreted § 1226(c) in a way that implicitly rejects the BIA's holding in *Rojas*. Indeed, even the BIA, which issued the decision that led to the First Circuit's ruling, interpreted § 1226(c) in a way that implicitly rejects its holding in *Rojas*.

While the Ninth Circuit has yet to address the interpretation of § 1226(c), its district courts have resoundingly rejected the government's position. From the enactment of § 1226(c) in 1996 to the present, almost every district court to consider that position—that the government can arrest aliens who have com-

mitted an offense described in § 1226(c)(1) whenever it prefers and subject them to mandatory detention—has rejected it. The Honorable William J. Dwyer of this District was among the first to consider the issue, albeit in the context of transitional rules that applied between the enactment of § 1226(c) in 1996 and its effective date in 1998. *Pastor-Camarena v. Smith*, 977 F. Supp. 2d 1415 (W.D. Wash. 1997). He concluded that the transitional rules made mandatory detention applicable only to aliens taken into federal custody immediately after their release from non-federal custody. *Id.* at 1418. Since then, every judge in this District has reached the same conclusion as to § 1226(c). *E.g.*, *Quezada Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1231 (W.D. Wash. 2004) ("[T]he mandatory detention statute . . . does not apply to aliens who have been taken into immigration custody several months or several years after they have been released from state custody.") (Theiler, M.J.); *Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1240 (W.D. Wash. 2012) (reaching same conclusion, declining to follow *Hosh*) (Pechman, J.); *Deluis-Morelos v. ICE Field Office Dir.*, No. C12-1905JLR, 2013 U.S. Dist. LEXIS 65862, at *13, 22 (W.D. Wash. May 8, 2013) (reaching same conclusion, declining to follow *Hosh* or *Sylvain*). Other district courts in the Ninth Circuit are in accord. *E.g.*, *Mejia Espinoza v. Aitken*, No. 5:13-cv-512EJD, 2013 U.S. Dist. LEXIS 34919, at *13-16, 21 (N.D. Cal. Mar. 13, 2013) (citing various district court rulings). The court is aware of just one district court within the Ninth Circuit who has ruled to the contrary. *Quiroz Gutierrez v. Holder*, No. 13-cv-5478-JST, 2014 U.S. Dist. LEXIS, at *24-25 (N.D. Cal. Jan. 2, 2014) (following *Sylvain*). Although district courts outside the Ninth

Circuit have usually rejected the government's position, some have not. *See Sylvain*, 714 F.3d at 156 & n.5-6 (listing district courts around the country who have adopted or rejected government's view of mandatory detention); *Gordon v. Johnson*, No. 13-cv-30146-MAP, 2013 U.S. Dist. LEXIS 181980, at *22 (D. Mass. Dec. 31, 2013) (citing cases).

Considering the foregoing precedent as persuasive authority, and paying particular attention to the views of the First, Third, and Fourth Circuits, the court rules as follows. First, the mandatory detention authority provided in § 1226(c)(2) unambiguously applies only to aliens who have been detained "when . . . released" from state custody. The court does not agree with the BIA's determination in *Rojas* that the phrase "alien described in paragraph (1)" is ambiguous, and thus the court does not defer to the BIA's interpretation of that phrase. Second, an alien is detained "when . . . released" only if DHS detains him immediately upon his release from non-DHS custody for an offense specified in subparagraphs (1)(A) through (1)(D). Third, for any alien taken into federal custody at a time other than "when . . . released" from state custody, § 1226 unambiguously requires that the alien be given an opportunity to win release on bond. To summarize, only aliens who have *both* committed an offense specified in subparagraphs (1)(A)-(1)(D) and have been taken into DHS custody immediately upon their release from non-DHS custody for one of those offenses are subject to mandatory detention. The court now explains its conclusions.

2. An Alien "Described in Paragraph (1)" is An Alien Who Has Both Committed a Qualifying Offense and Been Taken Into Federal Custody "When . . . Released" From State Custody.

So far as the court is aware, no court has ever adopted the holding from *Rojas*:

> We construe the phrasing "an alien described in paragraph (1)," as including only those aliens described in subparagraphs (A) through (D) of section [1226(c)(1)], and as not including the "when released" clause.

23 I & N Dec. at 18. That is with good reason, because *Rojas* interprets § 1226(c) in a way that makes the release of the alien from non-DHS custody irrelevant. Were *Rojas* an accurate interpretation of the law, the government could subject to mandatory detention any alien who committed an offense described in subparagraphs (1)(A) through (1)(D). No one, not even the BIA, believes that to be a fair reading of the statute. In *In re Saysana*, 24 I. & N. Dec. 602, 604 (BIA 2008), the BIA explained as follows:

> The "released" language of section [1226(c)(1)] of the Act is not expressly tied to any other language that would clarify whether it refers to release from criminal custody, DHS custody, or some other form of detention. However, we have interpreted this language to include a release from a non-DHS custodial setting after the expiration of the [transitional rules preceding the effective date of the amendments to § 1226].

That explanation was integral to the BIA's holding that an alien who committed an offense described in sub-

paragraphs (1)(A) through (1)(D) was subject to mandatory detention so long as the government detained him after release from *any* non-DHS custody, even custody for an offense beyond the scope of those subparagraphs. *Id.* at 608. But if the BIA believed that it correctly interpreted § 1226(c) in *Rojas*, its ruling in *Saysana* was unnecessary. If *Rojas* was rightly decided, then *Saysana* required nothing more of the BIA than a simple statement that it makes no difference when or whether an alien is released from non-DHS custody or for what crime, because the only precondition to mandatory detention (according to *Rojas*) is commission of a crime listed in subparagraphs (1)(A) through (1)(D).

No court has even suggested that it could decouple mandatory detention from the requirement that an alien first be released from custody. When the First Circuit considered the habeas petition of the alien detained in the wake of *Saysana*, the court squarely rejected the notion that mandatory detention does not depend on a prior release from custody. The court explained that a "natural reading" of § 1226(c) "makes clear that the congressional requirement of mandatory detention is addressed to the situation of an alien who is released from custody for one of the enumerated offenses [of subparagraphs (1)(A) through (1)(D)]." *Saysana*, 590 F.3d at 13. Along the way, it rejected the government's argument that it should be able to detain any alien who committed an offense listed in subparagraphs (1)(A) through (1)(D), even if that offense never resulted in a form of non-DHS custody. *Id.* at 14. It explained that "the plain language of the statute does not render the term 'when released'

meaningless as applied to the[] subsections [of § 1226(c)(1)] that do not require a conviction." *Id.* The *Saysana* court recognized that an alien who committed an offense described in subparagraphs (1)(A) through (1)(D) but never came into non-DHS custody would not be subject to mandatory detention. *Id.* It nonetheless declined to adopt the "strained" reading of the statute that the government preferred. *Id.*

Although the *Hosh* court purported to follow *Rojas*, its holding was merely that mandatory detention did not require DHS to "*immediately*" detain an alien upon his release from non-DHS custody. 680 F.3d at 381. Had *Hosh* followed *Rojas*, it would simply have held that release from non-DHS custody is not a precondition of mandatory detention. The *Sylvain* court, acknowledging that the *Hosh* court did not actually follow *Rojas*, declined to "take a stand on th[e]" issue of whether *Rojas* was rightly decided. 714 F.3d at 157 & n.9.

This court concludes that § 1226(c) unambiguously conditions the availability of mandatory detention on an alien's release from non-DHS custody. *Rojas* is entitled to no deference. An alien "described in paragraph (1)" is an alien who both committed a predicate offense *and* was taken into DHS custody "when . . . released" from non-DHS custody.

3. Mandatory Detention Is Available Only When DHS Takes an Alien Into Custody Immediately Upon His Release From Non-DHS Custody.

Having concluded that an alien's release from non-DHS custody is a precondition to mandatory detention, it remains to decide what it means that DHS must take

the petitioner into custody "when the alien is released." Reading this phrase without statutory context, it is possible to interpret it in a variety of ways. At one extreme, it could mean "at the moment the alien is released"; at the other, it might mean "at any time after the alien is released." *See, e.g.*, Gov't Mot. (Dkt. # 28) at 9 (offering various dictionary definitions of "when"); *Hosh*, 680 F.3d at 379-80 (reviewing dictionary definitions of "when"). But read in the context of § 1226 as a whole, the latter interpretation cannot stand. The phrase "when . . . released" appears not in a description of conditions of mandatory detention, it appears in a mandate that the government "shall take into custody" any alien who has committed certain offenses. § 1226(c)(1). A mandate is meaningless if those subject to it can carry it out whenever they please. "Take out the trash when you get home," is not at all the same as "take out the trash at any time after you get home, even months or years later." The Fourth Circuit recognized as much in *Hosh*, concluding that the mandate "connotes some degree of immediacy," 680 F.3d at 381, but that it did not require DHS custody to follow immediately after non-DHS custody. This interpretation cannot withstand scrutiny.

That § 1226(c) mandates detention without bond for certain aliens is proof enough that the mandate requires immediate detention. Many courts considering the import of the mandate have looked to the statute's legislative history, observing that Congress was concerned that deportable criminal aliens often committed additional crimes before their removal and that many of them failed to appear for removal hearings. *See Hosh*, 680 F.3d at 381 (citing discussion of § 1226(c)'s legislative history from *Demore*, 538 U.S. at 518). But

it is not necessary to know *why* Congress wanted immediate detention of certain aliens without the possibility of bond to know that it did want it. Congress created a non-mandatory detention scheme in § 1226(a). Any deportable alien, including those who committed an offense enumerated in subparagraphs (1)(A) through (1)(D), is subject to non-mandatory detention. That is to say that any alien subject to removal can be taken into custody when DHS prefers. It defies logic to imagine that Congress would have created a parallel system of mandatory detention without bond for certain categories of aliens while permitting the government to give, through inaction, the very unsupervised freedom that the mandate was designed to eliminate. A mandate to take an alien subject to mandatory detention into DHS custody "at some undetermined point after the alien is released from non-DHS custody" is not mandatory detention at all, or at least it is not all the mandatory detention scheme that Congress imposed.

Because the court finds that a requirement of anything other than immediate DHS custody following release from non-DHS custody is inconsistent with the mandatory detention scheme that Congress created in § 1226, the court finds that the requirement that the government take custody "when the alien is released" is a requirement for detention immediately following release from non-DHS custody.

4. The Statute Recognizes that Ordinary Detention is Sufficient for Aliens Who Are Not Taken into DHS Custody "When Released" from Non-DHS Custody.

In the court's view, the strongest argument in favor of the broad mandatory detention scheme that the government advocates is one that the *Hosh* and *Sylvain* courts recognized: better late than never. Put in more lawyerly fashion, a mandate that the government shall act at a specified time is not, without more, a prohibition on acting after that time. *Sylvain*, 714 F.3d at 158. Congress presumably issues mandates for the benefit of a particular segment of the public, and thus it is typically inadvisable to interpret a mandate to deprive that segment of that benefit merely because of "[b]ureaucratic inaction—whether the result of inertia, oversight, or design . . . ." *Id.* at 158.

The so-called "better-late-than-never principle," *Sylvain*, 714 F.3d at 158 (quoting *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009)), is a sensible canon of statutory interpretation when a contrary interpretation would deprive the intended beneficiaries of the benefits of a statute. That is not so in the case of mandatory detention. By failing to detain an alien subject to mandatory detention immediately after his release from non-DHS custody, DHS has *already* deprived the public of the benefits of mandatory detention. It has allowed an alien to walk free for days, weeks, months, or years, when Congress believes that alien presents such a presumptive risk of danger or flight that he should be immediately confined upon his release from non-DHS custody. Moreover, once an alien has left non-DHS custody, the need for a *pre-*

sumption of danger or risk of flight is reduced or non-existent. *Saysana*, 590 F.3d at 17 ("[I]t stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be."). In the time since the alien's release, he has either evaded custody or he has not, and he has either demonstrated himself to be a danger to the community or he has not. He has, in other words, given either himself or the government the fodder for a bond hearing.[2] Conditioning mandatory detention on DHS custody immediately upon release from non-DHS custody does not deprive the public of the benefit of detention, because detention remains available via § 1226(a). The DHS's failure to meet that condition deprives the public of whatever additional benefit inures in mandatory detention.

Both the *Hosh* and *Sylvain* courts took guidance on their application of the better-late-than-never principle from *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). There, the Court considered whether the government lost the authority to detain a criminal defendant without bail when it failed to hold a detention

---

[2] The government contends that a deportable alien has no incentive to flee until he knows the government has begun removal proceedings against him. That contention presumes that aliens who have committed crimes listed in subparagraphs (1)(A) through (1)(D) are unaware of the potential immigration consequences. The court is unwilling to make that presumption. Moreover, if Congress had wanted to condition mandatory detention upon the commencement or removal proceedings, it certainly could have done so. Instead, it conditioned it upon a release from non-DHS custody. In any event, the government ignores that an alien is as much a danger to the community before removal proceedings have begun as after.

hearing within the time specified by statute. *Id.* at 714-15. The Court concluded that the mandatory hearing deadline did not "operate to bar all authority to seek pretrial detention once the time limit has passed." *Id.* at 718. But consider the distinction between *Montalvo-Murillo* and this case: in *Montalvo-Murillo*, the government would have lost all power to detain the defendant before trial; in this case the government loses nothing, it merely has to present its case for pre-removal detention at a bond hearing. The "better-late-than-never" principle is not itself a mandate, it is merely a specific application of the mandate to construe a statute consistent with its design and purpose. *See id.* at 719. In the context of § 1226, the availability of ordinary bond hearings is a satisfactory alternative to mandatory detention in cases where DHS has already foregone the benefits of mandatory detention through failure to detain the alien upon his release from non-DHS custody.

There is little question that Congress was aware that some aliens who commit offenses described in subparagraphs (1)(A) through (1)(D) would avoid mandatory detention and receive ordinary bond hearings. To begin, as even the BIA acknowledges, Congress allowed all aliens who had committed such offenses and been released prior to the 1998 effective date of the amendments to § 1226(c) to avoid mandatory detention. *Saysana*, 24 I. & N. Dec. at 604; *Saysana*, 590 F.3d at 17 n.6 ("[I]n crafting the new provisions, Congress . . . made explicit that only releases after the effective date would trigger mandatory detention."). This is further proof that Congress viewed a release from non-DHS custody as a prerequisite of mandatory detention, as the court discussed in Part III.A.2, *supra*.

But it also demonstrates that Congress did not view ordinary bond hearings as an invariably unacceptable outcome for aliens who committed the listed crimes. *Saysana*, 590 F.3d at 17 ("Congress was no doubt aware that, under some circumstances, aliens with criminal histories that predate the passage of IIRIRA remain eligible for forms of relief not available to aliens with more recent criminal convictions."). Also escaping mandatory detention are aliens who commit offenses described in subparagraphs (1)(A) through (1)(D), but are not taken into non-DHS custody. For example, aliens who engage in terrorism are "inadmissible under section 1182(a)(3)(B)," as set out in subparagraph (1)(D). But, if DHS arrests an alien who has "under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(III), *before an entity other than the DHS has taken the alien into custody*, the alien must receive an ordinary bond hearing. Congress could have avoided this result with ease by declaring that any alien who commits an offense enumerated in subparagraphs (1)(A) through (1)(D) is subject to mandatory detention. Instead, it tied mandatory detention to a release from non-DHS custody. This is proof enough that Congress was not concerned with a comprehensive mandatory detention scheme tied to certain offenses, but rather concerned with creating a scheme that ensured that aliens who committed certain offenses could be transferred seamlessly from non-DHS custody to mandatory detention. *See Gordon*, 2013 U.S. Dist. LEXIS 181980, at *17 ("The obvious goal was to ensure the direct transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities.").

For all of these reasons, the court concludes that § 1226(c) unambiguously dictates that only aliens who have committed offenses listed in subparagraphs (1)(A) through (1)(d) *and* have been taken into DHS custody immediately upon their release from non-DHS custody for one of those offenses are subject to mandatory detention.

B. Plaintiffs Have Met the Requirements to Certify a Rule 23(b)(2) Class.

Plaintiffs ask the court to certify a class defined as follows:

> All individuals in the Western District of Washington who are or will be subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody at the time of their release from criminal custody for an offense referenced in § 1226(c)(1).

The court modifies that definition slightly, to emphasize that class members are aliens who the government *asserts* are subject to mandatory detention, not necessarily aliens who actually are subject to mandatory detention. It also modifies the phrase "at the time of" to emphasize that DHS custody must occur immediately upon release from non-DHS custody.

> All individuals in the Western District of Washington who the government asserts or will assert are subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody immediately upon their release from criminal custody for an offense referenced in § 1226(c)(1).

The court's decision to certify a class is discretionary. *Vinole v. Countrywide Home Loans, Inc.*, 571

F.3d 935, 944 (9th Cir. 2009). Rule 23 of the Federal Rules of Civil Procedure guides the court's exercise of discretion. A plaintiff "bears the burden of demonstrating that he has met each of the four requirements of Rule 23(a) and at least one of the [three] requirements of Rule 23(b)." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to demonstrate that the proposed class is sufficiently numerous, that it presents common issues of fact or law, that it will be led by one or more class representatives with claims typical of the class, and that the class representatives will adequately represent the class. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a)(1)-(4). If a plaintiff satisfies the Rule 23(a) requirements, she must also show that the proposed class action meets one of the three requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs in this case invoke only Rule 23(b)(2), which requires them to show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The government scarcely opposes Plaintiffs' motion for class certification. It does not, for example, dispute that the class is sufficiently numerous. Plaintiffs knew of at least a dozen aliens at the time they moved for class certification who were being detained without a bond hearing as a result of the government's misinterpretation of § 1226(c). It knew of at least a dozen more who had been wrongfully detained in the past two years. Given that most aliens at the NWDC have no counsel, it is safe to assume that there are many more

class members. Moreover, the DHS has done nothing to assure Plaintiffs or the court that it will not continue to take into custody aliens after their release from non-DHS custody and subject them to mandatory detention. The class is sufficiently numerous both as to aliens currently subject mandatory detention at the NWDC and as to aliens who the government will subject to mandatory detention at the NWDC. There is no dispute that the joinder of all of these class members as plaintiffs would be impracticable, as Rule 23(a)(1) requires.

Each class member's statutory claim presents questions of law or fact common to the class. The relevant factual questions are the same for every class member. Is the government holding the alien in mandatory detention (or will it seek to do so)? If so, did the government arrest the alien immediately upon his release from non-DHS custody for an offense described in subparagraphs (1)(A) through (1)(D)? The court has already answered the legal question dispositive of each class member's claim: may the government lawfully subject to mandatory detention aliens for whom the answer to the second question is "no"?

The government also contends that Plaintiffs' claims (and the defenses to those claims) are not typical of the class. That argument, however, depends on the government's view that the amount of time between a class member's release from non-DHS custody and DHS's eventual arrest of the class member is relevant to whether he is subject to mandatory detention. It is not. Plaintiffs are typical of class members in the only way that matters: they are in mandatory detention

even though DHS did not take them into custody immediately upon their release from non-DHS custody.

The government contends that Plaintiffs are inadequate class representatives for the same reason that their claims are allegedly atypical. That contention does not withstand scrutiny, as the court has just explained. Plaintiffs are, however, atypical of many class members in that they have now secured their release on bond, by virtue of the government's adherence to the six-month limit on mandatory detention from *Rodriguez* and the authority on which *Rodriguez* relies. Even the government acknowledges, however, that at least Mr. Khoury and Mr. Rodriguez may take advantage of an exception to the mootness doctrine that ensures that courts can review "transitory claims" of class representatives. *See Haro v. Sebelius*, No. 11-16606, 2014 U.S. App. LEXIS 61, at *21 (9th Cir. Jan. 2, 2014). Here, the government's adherence to *Rodriguez* ensured that Mr. Rodriguez's and Mr. Khoury's mandatory detention ended after six months, thereby placing them squarely within the transitory claim exception. The court concludes that all three Plaintiffs are adequate class representatives.[3]

---

[3] Mr. Carrera's mandatory detention ended after four months when DHS decided that he was not actually subject to mandatory detention, regardless of the government's erroneous interpretation of the mandatory detention statute. Before that, however, he was plainly subject to mandatory detention because of the government's erroneous interpretation of § 1226(c), and his claim is plainly transitory. The court is aware of nothing that would make Mr. Carrera an inadequate class member. Even if the court were mistaken, Mr. Rodriguez and Mr. Khoury can adequately represent the class.

What remains is to consider Rule 23(b)(2), which permits a court to certify a class for injunctive or declaratory relief when that relief would apply equally to all class members. Here, there is no question that all class members will benefit equally from the court's declaration that the government may not subject an alien to mandatory detention via § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D).

C. The Court Will Impose Only Declaratory Relief At This Time, Although It Will Consider Injunctive Relief If Necessary.

As the court has explained, there are no barriers to entry of final relief on the merits of Plaintiffs' statutory claim. The court queries, however, whether it is necessary to impose a permanent injunction in addition to the classwide declaratory relief that the court has already awarded. The import of the court's declaration is plain: the government violates the law to the extent it continues to subject to mandatory detention aliens who it did not take into custody at the proper time. The court has no reason to expect that the government will not take appropriate action to end its violation of the law.

Accordingly, rather than impose an injunction, the court today will issue only its declaratory ruling. The government will have two weeks from today to assess how it will respond to that declaration. No later than March 26, 2014, it shall meet and confer with counsel for Plaintiffs to reveal its plans for complying with the law. If Plaintiffs are unsatisfied with those plans, or if they believe for another reason that injunctive relief is

necessary, they may file a statement of five pages or fewer explaining their position. They must file that statement no later than April 2, 2014. Alternatively, the parties may by the same deadline file a stipulated motion for a permanent injunction or a statement that they agree that injunctive relief is unnecessary to afford complete relief to the class. Finally, the parties shall meet and confer to discuss what, if anything, Plaintiffs wish to do to pursue their Due Process claim to judgment. The parties shall share their views on that subject in a joint statement they file no later than April 2, 2014. They may combine that statement with any other pleading they file on April 2.

IV. CONCLUSION

For the reasons previously stated, the court GRANTS Plaintiffs' motion for class certification (Dkt. # 2) and certifies as class as defined in this order. The court DENIES Defendants' motion to dismiss. Dkt. # 28. The court directs the clerk to TERMINATE Plaintiffs' motion for injunctive relief (Dkt. # 14), without prejudice to renewing a request for a permanent injunction in accordance with this order.

The court issues the following declaratory ruling on behalf of the class: The government may not subject an alien to mandatory detention via 8 U.S.C. § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D) of § 1226(c).

DATED this 11th day of Mar., 2014.

/s/ RICHARD A. JONES
Richard A. Jones
The Honorable Richard A. Jones
United States District Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16326, 14-16779
D.C. No. 4:13-cv-05754-YGR
Northern District of California, Oakland

MONY PREAP; ET AL., PLAINTIFFS-APPELLEES

v.

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ET AL., DEFENDANTS-APPELLANTS

[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

DATED this 11th day of Mar., 2014.

/s/ RICHARD A. JONES
Richard A. Jones
The Honorable Richard A. Jones
United States District Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16326, 14-16779
D.C. No. 4:13-cv-05754-YGR
Northern District of California, Oakland

MONY PREAP; ET AL., PLAINTIFFS-APPELLEES

v.

JEH JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ET AL., DEFENDANTS-APPELLANTS

[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35482
D.C. No. 2:13-cv-01367-RAJ
Western District of Washington, Seattle

BASSAM YUSUF KHOURY; ET AL.,
PLAINTIFFS-APPELLEES

v.

NATHALIE ASHER, FIELD OFFICE DIRECTOR, ICE;
ET AL., DEFENDANTS-APPELLANTS

[Filed: Jan. 11, 2017]

ORDER

Before: KLEINFELD, NGUYEN, and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc and Judge Kleinfeld has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

APPENDIX G

1. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal ac-

---

[1] So in original. Probably should be "sentenced".

tivity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for pur-

poses of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

2. 8 C.F.R. 236.1 provides in pertinent part:

Apprehension, custody, and detention.

(c) *Custody issues and release procedures*—(1) *In general.* (i) **After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released** from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *

3. 8 C.F.R. 1236.1 provides in pertinent part:

Apprehension, custody, and detention.

(c) *Custody issues and release procedures*—(1) *In general.* (i) After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to

property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *

RECORD AND BRIEFS

No. 16-1363

IN THE

Supreme Court of the United States

JOHN F. KELLY, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

—v.—

MONY PREAP, ET AL.,

Respondents.

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue
Seattle, WA 98104-2244

Robert Pauw
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98103

Counsel for Khoury Respondents

Michael K.T. Tan
Counsel of Record
Judy Rabinovitz
Cecillia Wang
Omar Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
mtan@aclu.org

Counsel for Preap and Khoury Respondents

(*Counsel continued on inside cover*)

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL.,

Petitioners,

—v.—

BASSAM YUSUF KHOURY, ET AL.,

Respondents.

Devin T. Theriot-Orr
SUNBIRD LAW, PLLC
1001 4th Avenue, Suite 3200
Seattle, WA 98154

Emily Chiang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
OF WASHINGTON
901 5th Avenue, Suite 630
Seattle, WA 98164

Counsel for Khoury Respondents

David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Counsel for Preap and Khoury Respondents

Julia Harumi Mass
AMERICAN CIVIL LIBERTIES
FOUNDATION OF NORTHERN
CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Anoop Prasad
Jingni (Jenny) Zhao
ASIAN AMERICANS ADVANCING
JUSTICE–ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, CA 94111

Ashok Ramani
Grace Y. Yang
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111

Counsel for Preap Respondents

QUESTION PRESENTED

These cases concern the proper construction of the mandatory detention provision of the Immigration and Nationality Act, Title 8 U.S.C. Section 1226(c).

Section 1226(c) is an exception to the general detention authority under Section 1226(a). Section 1226(a) authorizes detention of all noncitizens in removal proceedings, but affords individualized custody hearings at a noncitizen's request. At such a hearing, the noncitizen may seek release on bond only if she proves that she is neither a danger to the community nor a flight risk.

Section 1226(c), where applicable, precludes the immigration judge from conducting any custody hearing and mandates detention of a noncitizen even when the immigration judge would find that she poses no flight risk or danger. By its plain terms, Section 1226(c) directs that immigration officials "shall take into custody any alien who—[is subject to removal under the enumerated criminal grounds], when the alien is released" from the criminal custody.

The question presented is:

Whether Section 1226(c) imposes mandatory detention, without an individualized hearing on flight risk and danger, even when the Department of Homeland Security does not promptly detain an individual when she is released from criminal custody.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS TO DENY THE PETITION 13

I. REVIEW BY THIS COURT IS PREMATURE 13

A. Congress Is Considering Legislation to Amend Section 1226(c) to Comport with the Government's Position. 13

B. Review Is Premature Absent Further Lower Court Proceedings on What Constitutes Prompt Detention for Purposes of Section 1226(c) 14

C. This Court Is Reviewing the Scope of Mandatory Detention Under Section 1226(c) in *Jennings v. Rodriguez*. 19

II. THE COURT OF APPEALS' RULINGS ARE CORRECTLY DECIDED 20

A. The Plain Language and Purpose of the Statute Make Clear that Mandatory Detention Applies Only To Individuals Whom DHS Detains "When . . . Released" From Criminal Custody. 22

B. As Determined by Both the Court of Appeals and the Board of Immigration Appeals, "When" Does Not Mean "In the Event that." 29

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c). 30

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Brock v. Pierce Cty., 476 U.S. 253 (1986) 32

Castañeda v. Souza, 769 F.3d 32 (1st Cir. 2014) 29

Castañeda v. Souza,
810 F.3d 15 (1st Cir. 2015) 23, 24, 25, 29

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995) 26

Clark v. Martinez, 543 U.S. 371 (2005) 29

Comm'r of Internal Revenue v. Clark,
489 U.S. 726 (1989) 26

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 24

Deluis-Morelos v. ICE Field Office Dir.,
No. 12CV-1905JLR, 2013 WL 1914390
(W.D. Wash. May 8, 2013) 23

Gordon v. Kelly,
No. 13-cv-30146 MAP (D. Mass. Apr. 13, 2017) ... 18

Gordon v. Lynch, 842 F.3d 66 (1st Cir. 2016) 16, 17

Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) .. 10, 19

Judulang v. Holder, 565 U.S. 42 (2011) 30

Khodr v. Adduci,
697 F. Supp. 2d 774 (E.D. Mich. 2010) 24

Matter of Guerra, 24 I. & N. Dec. 37 (BIA 2006) . 4, 31

Matter of Rojas,
23 I. & N. Dec. 117 (BIA 2001) ..... *passim*

Matter of Urena, 25 I. & N. Dec. 140 (BIA 2009) 31

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 26

Mount Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944 (2012) 15

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998) 18

Olmos v. Holder, 780 F.3d 1313 (10th Cir. 2015) 25

Rodriguez v. Robbins,
715 F.3d 1127 (9th Cir. 2013) 10, 27

Rodriguez v. Robbins,
804 F.3d 1060 (9th Cir. 2015) 10

Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009) 25, 26

SEC v. Chenery Corp., 332 U.S. 194 (1947) 30

Stutson v. United States, 516 U.S. 163 (1996) 16

TRW Inc., v. Andrews, 534 U.S. 19 (2001) 23

United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993) 32

United States v. *Montalvo-Murillo*,
495 U.S. 711 (1990) 3, 31, 32

STATUTES

8 U.S.C. § 1153(b)(5)(B)(i) 25

8 U.S.C. § 1226(a) ..... *passim*

8 U.S.C. § 1226a(a) 8

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1226(c)(1) ..... *passim*

8 U.S.C. § 1226(c)(2) 6, 22, 23

8 U.S.C. § 1227(a)(2)(E) 28

8 U.S.C. § 1229b(a) 9

8 U.S.C. § 1357(g) 18

8 U.S.C. § 1537 8

Homeland Security Act of 2002,
Pub. L. No. 107-296, 116 Stat. 2135, 2192 5

LEGISLATIVE MATERIALS

No Sanctuary for Criminals Act,
H.R. 3003, 115th Cong. § 4(a)(3) (2017) 13, 14

REGULATIONS

8 C.F.R. § 1236.1(d) 4

OTHER AUTHORITIES

Immigrant Legal Resource Ctr., *Searching for Sanctuary: an Analysis of America's Counties and their Voluntary Assistance with Deportations* (Dec. 2016) 18

ICE, *Criminal Alien Program*,
https://www.ice.gov/criminal-alien-program
(last visited June 22, 2017) 18

ICE Enforcement and Removal Operations Report Fiscal Year 2016 17

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 14, 15, 16

INTRODUCTION

The government asks this Court to grant review and endorse its expansive construction of the mandatory detention provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. Section 1226(c). It seeks to deny custody hearings to all persons in immigration proceedings who have ever been in criminal custody for certain offenses, *regardless of how long the individuals have lived peaceably and without incident in the community* after their release from criminal custody. Under the government's interpretation, individuals who can prove to an immigration judge that they pose no danger or flight risk will nonetheless be confined in immigration detention, often for months or even years on end. Review should be denied both because it is premature, and because the lower court decisions were correctly decided.

First, legislation is pending in Congress (and has passed in the House of Representatives) that would revise Section 1226(c) to impose mandatory detention regardless of when the Department of Homeland Security ("DHS") takes the noncitizen into custody—the very result the government seeks from this Court. In considering this bill, Congress has recognized that the existing statute does *not* provide for mandatory detention in these circumstances. The Court should decline the government's invitation to rewrite statutory language that Congress itself is in the process of reconsidering.

Second, the as-yet unresolved question of what constitutes "prompt" detention in these cases warrants deferring review. The court of appeals held that Section 1226(c) applies only where the

government takes an individual into custody "promptly" upon release, App. 27a, 59a, but because of the interlocutory posture of *Preap* and the summary and non-precedential character of *Khoury*, it has not yet determined what the prompt detention requirement entails. That question is arising in litigation in at least two circuits, the First and the Ninth. *See* Point I.B., *infra*. This Court will be better positioned to address the obligations of Section 1226(c) when the lower courts have had an opportunity to resolve that question.

Third, this Court is currently considering the proper construction and constitutionality of Section 1226(c) in *Jennings v. Rodriguez*, No. 15-1204. At a minimum, the Court should defer any review pending its ruling in *Jennings* on the scope of mandatory detention under Section 1226(c).

This Court should also deny review because the cases were correctly decided. By its terms, Section 1226(c) is a limited exception to the default detention statute, 8 U.S.C. § 1226(a), which generally authorizes the government to detain anyone in removal proceedings, unless an immigration judge finds that the detainee has met her burden of proving that she is neither a flight risk nor a danger to the community. The Ninth Circuit in *Preap* held that the unambiguous language of Section 1226(c) applies mandatory detention—that is, detention even where an individual can prove that she is neither a flight risk nor a danger—only to those noncitizens whom DHS detains "when the alien is released" from criminal custody. *See* App. 19a.

This construction is compelled by the plain language of the statute and advances Congress's

purpose: to focus limited detention resources on individuals who are presumed to pose the greatest flight and safety risks by ensuring that they are promptly transferred from criminal to immigration custody. *See* App. 22a-23a, 26a-27a. The government's contrary reading—whereby DHS would impose mandatory detention *any time after* an individual's release from criminal custody—would require it to impose mandatory detention on individuals who have been released months, years, or even more than a decade earlier, and who therefore have an actual record of living at liberty in the community without posing any flight risk or danger to others. As the court of appeals found, the government's construction of Section 1226(c) flouts Congress's text and purpose. *See id.*

The Ninth Circuit's rulings do not impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants," as Petitioners claim. *See* Pet. 12 (quoting *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 720 (1990)). The rulings do not mandate the *release* of anyone. DHS is authorized by Section 1226(a) to detain anyone placed in removal proceedings. The only consequence of the court of appeals' ruling is to afford a bond hearing before an immigration judge to individuals not promptly detained "when . . . released," at which the noncitizen bears the burden of proving a negative to obtain release on bond—namely, that she poses no danger or risk of flight. The only persons released will be those who are able to defeat a presumption that they are a flight risk and danger, to the satisfaction of an immigration judge. All others will remain in detention. *See* App. 25a-26a.

The government's petition should be denied.

STATEMENT OF THE CASE

I. Legal Framework

Section 1226 of Title 8 of the U.S. Code governs the detention of noncitizens during removal proceedings. It affords the government substantial detention authority in every case, permitting release on bond only when an immigration official finds that a noncitizen in removal proceedings has affirmatively overcome a presumption that she poses a flight risk and a danger. This is a heavy burden, requiring the detainee to prove a negative in order to win a bond order.

Section 1226(a) sets forth the Secretary of Homeland Security's general discretionary detention authority and provides that DHS may arrest and detain any individual pending a decision on her removal. It states that, "*[e]xcept as provided in subsection (c),*" DHS "may continue to detain" the individual or "may release" the individual on either bond or conditional parole. 8 U.S.C. § 1226(a) (emphasis added). If the government detains a noncitizen under Section 1226(a), that noncitizen may seek review of the decision by an immigration judge at a custody hearing. *See* 8 C.F.R. § 1236.1(d); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). But at such a hearing, the government enjoys a presumption in favor of detention, and the noncitizen bears the burden of proving she is neither a danger to the community nor a flight risk in order to secure release from detention. *Guerra*, 24 I. & N. Dec. at 40.

Section 1226(c) is a narrow exception to the general detention provision created by Section

1226(a). In certain circumstances arising from enumerated criminal grounds for the removal charge, Section 1226(c) requires detention without a bond hearing even when an immigration judge would find that the noncitizen has proved that she is neither a flight risk nor a danger to the community. Section 1226(c) provides as follows:

> (1) Custody
>
> The [Secretary of Homeland Security][1] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

---

[1] Although the statute refers to the "Attorney General," the Attorney General's detention authority under Section 1226 is shared with the Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192.

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The [Secretary of Homeland Security] may release *an alien described in paragraph (1)* only if the [Secretary] decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c) (emphasis added).

Thus, Section 1226(c)(1) requires that the Secretary take custody of the noncitizen "when the alien is released" from custody for one of the enumerated criminal offenses. Section 1226(c)(2) then prohibits the release of "an alien described in paragraph (1)" during the pendency of her removal case—except for the limited purposes of the federal witness protection program. In other words, if an

individual falls into the class of persons defined by Section 1226(c)(1), she has been taken into immigration custody when released from criminal custody, and will be maintained in custody and denied a bond hearing during her removal proceedings. Otherwise, the general detention statute, Section 1226(a), applies, and an immigration judge conducts an individualized custody hearing, which, as noted above, leads to release on bond only if the noncitizen can prove that she is neither a flight risk nor a danger to the community.

II. Factual Background

The government seeks certiorari in two parallel cases decided by the Ninth Circuit, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), and *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (unpublished memorandum disposition). App. 1a, 58a. In each case, a lead plaintiff and two other named plaintiffs filed a class action complaint on behalf of themselves and similarly situated individuals. Class members in both *Preap* and *Khoury* are individuals who were convicted of a removable offense listed under Section 1226(c)(1), released to their families after completing their criminal sentences, and later subjected to mandatory detention by the immigration authorities—in some cases *years* after they were released and living peaceably and without incident in the community. They challenge the government's application of Section 1226(c) to individuals who were not detained "when . . . released" from criminal custody.

Although the government repeatedly asserts that the Ninth Circuit rulings apply to "terrorists," both the *Preap* and *Khoury* class certification orders

specifically exclude noncitizens held under the detention statutes Congress has enacted for removal cases implicating terrorism and national security. *See* App. 80a-81a, 95a n.11, 131a-32a. These other statutes, not at issue here, explicitly authorize detention without bond hearings for national security detainees, but subject their cases to high-level review within the Department of Justice. *See* 8 U.S.C. § 1226a(a) (authorizing immigration detention with specialized review procedures in national security cases); 8 U.S.C. § 1537 (authorizing detention for noncitizens in proceedings before the Alien Terrorist Removal Court). Moreover, the government has never identified an individual charged as a terrorist in the plaintiff classes, nor has it explained why the authority Congress specifically provided for mandatory detention in national security cases does not suffice to protect public safety. *See* App. 80a & n.6.

A. Mony Preap

Mony Preap has been a lawful permanent resident since 1981, when he was brought to the United States as an infant. App. 6a. He was born in a refugee camp after his family fled Cambodia's Khmer Rouge. *Id.* Mr. Preap is the primary caretaker for his son, a United States citizen, as well as for his mother, who is in remission from cancer and suffers from seizures. App. 63a.

In 2006, Mr. Preap was convicted of two counts of possession of marijuana under section 11357(a) of the California Health and Safety Code. App. 64a. He was sentenced to time served and released from jail at the time of his convictions. App. 6a, 64a. Years later, in September 2013, Mr. Preap was convicted of

simple battery in violation of section 242 of the California Penal Code. App. 64a. Upon his release from criminal custody for that misdemeanor conviction—which is not a deportable offense and, more to the point, is not a criminal offense triggering Section 1226(c)'s mandatory detention provision—DHS arrested Mr. Preap, charged him as being removable from the United States as a result of his 2006 misdemeanor convictions for possession of marijuana, and subjected him to mandatory detention under Section 1226(c). App. 6a, 64a. Mr. Preap was detained for three months without a bond hearing until the conclusion of his removal proceedings, when he won his case through a grant of cancellation of removal under 8 U.S.C. § 1229b(a) and was released to his family. App. 6a-7a, 64a.

B. Bassam Yusuf Khoury

Bassam Yusuf Khoury has been a lawful permanent resident of the United States since 1976. App. 110a. In June 2011, Mr. Khoury was released after serving a 30-day sentence for a drug charge. *Id.* In April 2013, approximately 22 months after his release from criminal custody, DHS arrested Mr. Khoury at his home. App. 110a-11a. DHS charged him as being removable due to his 2011 conviction and, for the same reason, subjected him to mandatory detention under Section 1226(c). *See* App. 109a. Mr. Khoury was then detained for more than six months without any hearing, until October 2013 when he finally received a hearing pursuant to the Ninth Circuit's decision in *Rodriguez v. Robbins*, 715

F.3d 1127 (9th Cir. 2013).[2] *See* App. 109a-10a. An immigration judge found that he posed no flight risk or danger and ordered him released on an $8,000 bond. *See id.*

III. Procedural History

A. *Preap v. Johnson*

On December 12, 2013, Mr. Preap, along with two other lead plaintiffs, filed a petition for writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated detainees. App. 60a. The proposed class consisted of all "[i]ndividuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." App. 96a. Plaintiffs maintained that they were not properly subject to mandatory detention because they were not detained by DHS "when . . . released" from criminal custody, as Section 1226(c) requires. App. 72a.

On May 15, 2014, the United States District Court for the Northern District of California issued a preliminary injunction, finding that plaintiffs were

---

[2] *See Rodriguez*, 715 F.3d at 1130-31 (affirming a preliminary injunction requiring bond hearings for individuals subjected to prolonged detention under Section 1226(c)). The Ninth Circuit subsequently upheld a permanent injunction to the same effect. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). That case is now pending before this Court. *See Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

likely to succeed on their claim that they were not subject to mandatory detention under Section 1226(c) because "the plain language of the statute commands the Attorney General to apprehend specified criminal aliens 'when [they are] released,' and no later." App. 77a. The district court also examined the legislative history of Section 1226(c), which demonstrated that "Congress wanted to ensure that certain criminal aliens would not be released following time served for certain offenses" by requiring a "seamless transition from state to federal immigration custody." App. 84a. The district court certified the proposed class and entered a preliminary injunction ordering an immediate bond hearing for Plaintiffs and class members. App. 61a. The government filed an interlocutory appeal from the district court's preliminary injunction.

A unanimous panel of the Ninth Circuit affirmed the district court's preliminary injunction, agreeing that plaintiffs were likely to succeed on their claim that Section 1226(c) applies only to individuals whom DHS detains "promptly" upon release. App. 27a. The court concluded that this reading of the statute was consistent with Congress's purpose of ensuring that noncitizens who present "heightened risks" associated with certain crimes are promptly placed in mandatory detention, noting that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." App. 22a. Because the named plaintiffs had lived for many years in the community before being detained, and the government had not challenged the scope of the class, the court of appeals concluded that it did not need to resolve, for purposes

of the preliminary injunction, what constituted a prompt detention. App. 27a-28a.

B. *Khoury v. Asher*

On August 1, 2013, Mr. Khoury and two other lead plaintiffs filed a petition for a writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated individuals in the Western District of Washington. App. 107a, 132a. Plaintiffs argued that Section 1226(c) did not apply to them because they were taken "into [immigration] custody well after their release from state custody, not 'when [they were] released.'" App. 113a.

On March 11, 2014, the United States District Court for the Western District of Washington certified a class and entered a declaratory judgment for Plaintiffs. App. 107a-08a. The district court certified a class consisting of "[a]ll individuals in the Western District of Washington who the government asserts or will assert are subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody immediately upon their release from criminal custody for an offense referenced in § 1226(c)(1)." App. 132a. On August 4, 2016, the Ninth Circuit affirmed the district court's decision in a two-paragraph unpublished order by the same panel, citing to its decision in *Preap*, which it published on the same day. App. 58a-59a. Because it was unpublished, *Khoury* has no precedential value. *See* App. 59a; Ninth Circuit Rule 36-3. Like *Preap*, it did not address what constitutes prompt detention.

The Ninth Circuit denied the government's petitions for rehearing en banc in both *Preap* and *Khoury*. App. 139a-40a.

REASONS TO DENY THE PETITION

I. REVIEW BY THIS COURT IS PREMATURE.

A. Congress Is Considering Legislation to Amend Section 1226(c) to Comport with the Government's Position.

Review is premature because Congress is currently considering bills that would modify the statutory language in question to embrace the result the government seeks from this Court.[3] The House of Representatives recently passed legislation that would amend Section 1226(c) to apply mandatory detention to noncitizens *regardless* of when DHS detains them after release. *See* No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. § 4(a)(3) (2017) (amending the statute to impose mandatory detention "*any time after the alien is released.*" (emphasis added)).[4] Thus, recognizing that the

---

[3] The court of appeals based its ruling on statutory grounds alone. *See* App. 6a n.5.

[4] The proposed legislation would replace the "when . . . released" clause with the following:

> The [Secretary] shall take into custody any alien who [is inadmissible or deportable for a predicate crime] *any time after the alien is released*, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to

existing statute does *not* provide for mandatory detention in these circumstances, Congress is currently considering whether to amend the statute to expand mandatory detention to additional persons, as urged by Petitioners. The Court should allow Congress the opportunity to revise the statute if it so chooses. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 6.37(i)(3) (10th ed. 2013) (explaining that where "Congress . . . is considering a modification or repeal of the provision at issue," the Court may "await a nonjudicial resolution of the issue presented . . . especially where debatable policy considerations are at issue").

B. Review Is Premature Absent Further Lower Court Proceedings on What Constitutes Prompt Detention for Purposes of Section 1226(c).

Review would also be premature in light of the ongoing proceedings in *Preap* on what constitutes prompt detention under Section 1226(c).

The court in *Preap* did not rule that DHS must take custody "at the precise moment of release," as Petitioners wrongly suggest. *See* Pet. 12 (internal quotation marks omitted). Indeed, the Ninth Circuit expressly declined to "require[] detention to occur at the exact moment an alien leaves custody," App. 27a, requiring only that DHS "promptly" take custody

---

> whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense.

H.R. 3003 § 4(a)(3) (emphasis added).

upon the person's release. *Id.*[5] At the same time, the Ninth Circuit declined at the preliminary injunction stage to specify "exactly how quickly detention must occur to satisfy the 'when . . . released' requirement." *Id.* Given that the case was set to return to the district court for discovery and further litigation with respect to a permanent injunction, the court concluded that it did not "need [to] decide for purposes of the instant appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody." App. 28a.

Thus, the *Preap* case does not present a proper vehicle for resolution of the issues raised in the government's petition because of its interlocutory posture and because significant issues affecting the merits of the questions raised in the government's petition remain to be resolved on remand to the district court. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring) (denial of certiorari appropriate where "no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take"); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (10th ed. 2013).

While the summary decision by the same panel in *Khoury* was not interlocutory, it left open

---

[5] *See also* App. 27a (holding that "apprehension must occur with a reasonable degree of immediacy," such that "depending on the circumstances of an individual case, an alien may be detained 'when . . . released' even if immigration authorities take a very short period of time to bring the alien into custody."); Pet. 14, 17 (acknowledging the Ninth Circuit's prompt detention rule).

the same question as in *Preap*. Because the panel opted not to issue a precedential decision, both the district court and the court of appeals will be able to address this question in the first instance after the parties have an opportunity to develop a record in *Preap*.[6]

Moreover, parallel litigation on the same issue is currently pending in the First Circuit, which recently directed a district court to determine what constitutes a "reasonable" delay in detention under Section 1226(c). *See Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016). In *Gordon*, the First Circuit vacated a class-wide injunction requiring the government to provide a bond hearing where DHS fails to detain the noncitizen within 48 hours (or, if a weekend or holiday intervenes, within five days) after release from criminal custody. The court of appeals remanded for further proceedings on the proper scope of relief, where DHS would be "requir[ed] . . . to

---

[6] Review is unwarranted in both *Preap* and *Khoury* for the reasons set forth herein. But, at a minimum, the Court should decline to grant review in *Khoury*. That case is an unpublished, non-precedential decision that merely applies the reasoning in *Preap*. The government concedes that both cases raise identical legal issues. *See* Pet. 1. Granting review in both cases would be contrary to judicial economy. Thus, should the Court be inclined to exercise review, the Court should stay the government's petition in *Khoury* pending review in *Preap* alone. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be [granted, vacated, and remanded ("GVR'd")] when the case is decided."); *accord* Stephen M. Shapiro et al., *Supreme Court Practice* § 14.6 (10th ed. 2013).

articulate its position on what constitutes a reasonable custody gap under § 1226(c), as well as what practical problems, if any, have resulted from the remedial order since its issuance." *Id.* at 71. Thus, as in *Preap*, the district court in *Gordon* also will address what it means to detain "when the alien is released" for purposes of Section 1226(c). The fact that this issue is still percolating among the lower courts is another reason that this Court's review would be premature.

In addition, review is unwarranted in this case because there is no factual record on which to assess the government's assertions about the practical implications of the court of appeals' ruling. *See, e.g.*, Pet. 8-9, 15-16. For example, Petitioners assert that a number of state and local jurisdictions decline detainer requests, preventing DHS from detaining persons at the time of their release. *See* Pet. 13. But there has been no record developed that would allow the Court to assess whether such declined requests actually prevent DHS from taking prompt custody or the frequency with which detainers are declined for individuals who fall within the scope of Section 1226(c).[7] Nor is there a developed record on the array of other enforcement tools that enable DHS to detain individuals promptly upon their release from

---

[7] The report Petitioners cite (*see* Pet. 13) itself documents a "77 percent drop in declined requests for transfer (from 8,542 in FY 2015 to 1,970 in FY 2016)" in FY 2016 due to "increased local law enforcement agency cooperation . . . and more selective and targeted issuance of detainers that align more closely to prioritized populations." *ICE Enforcement and Removal Operations Report Fiscal Year 2016*, at 9.

criminal custody. These include cooperative arrangements with the overwhelming majority of counties nationwide to notify DHS of individuals' release dates,[8] and the deployment of DHS officers[9] and deputized local law enforcement officers[10] at jails and prisons to apprehend individuals upon their release.[11]

A factual record on these issues will be developed on remand in *Preap*, and is currently being developed in litigation pending in the First Circuit. The district court has granted limited discovery on these issues, which is ongoing and will close on October 11, 2017. Scheduling Order 1, *Gordon v. Kelly*, No. 13-cv-30146 MAP (D. Mass. Apr. 13, 2017), ECF No. 194. But until such a factual record is developed and presented, this Court should not grant review. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) (issue not ripe for review where "further factual development would significantly advance [the Court's] ability to deal

---

[8] *See, e.g.*, Immigrant Legal Resource Ctr., *Searching for Sanctuary: an Analysis of America's Counties and their Voluntary Assistance with Deportations* 11 (Dec. 2016) (reporting based on DHS data that 94% of approximately 2,500 counties nationwide notify DHS when noncitizens are released from criminal custody).

[9] *See* ICE, *Criminal Alien Program*, https://www.ice.gov/criminal-alien-program (last visited June 22, 2017).

[10] *See* 8 U.S.C. § 1357(g).

[11] Petitioners did not seek stays of either orders of the district courts pending appeal to the Ninth Circuit, or the Ninth Circuit's orders pending their en banc petition or their petition to this Court to address any practical concerns.

with the legal issues presented" and "aid . . . in their resolution" (internal quotation marks omitted)).

In sum, because of the interlocutory nature of this appeal, the need for further elaboration of what "when . . . released" requires, and the need for development of a factual record on the assertions the government raises in its petition—questions that are still being litigated in the lower courts—this Court should defer any review for when the issue is properly presented after a final judgment in *Preap* or by another case.

C. This Court Is Reviewing the Scope of Mandatory Detention Under Section 1226(c) in *Jennings v. Rodriguez*.

Finally, this Court is presently considering the proper construction and constitutionality of mandatory detention under Section 1226(c) in *Jennings v. Rodriguez*, No. 15-1204. *Jennings* concerns, among other things, whether noncitizens who are "subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months."[12] Because the Court's ruling in *Jennings* could affect the issues presented here, granting review at this stage is premature.

---

[12] *See* Pet. for Writ of Cert. I, *Jennings v. Rodriguez*, No. 15-1204 (Mar. 28, 2016).

II. THE COURT OF APPEALS' RULINGS ARE CORRECTLY DECIDED.

In addition to the problems set forth above, review should be denied because the Ninth Circuit's rulings are correct on the merits. As the Ninth Circuit correctly held, Section 1226(c) unambiguously imposes mandatory detention only on those noncitizens whom DHS detains "when [they are] released" from criminal custody—and not individuals, like Plaintiffs, whom DHS detains months or years after they have returned to their families and communities. This conclusion is compelled by the plain language of the statute; its context and structure; and Congress's purpose of focusing limited detention resources on individuals who are presumed to pose the greatest flight and safety risks by ensuring that they are promptly transferred from criminal to immigration custody.

The government makes three arguments in defense of its expansive interpretation of Section 1226(c), all of which lack merit.

First, the government argues that the plain language of the "when . . . released" clause does not limit the class of persons subject to mandatory detention under Section 1226(c), but instead merely directs the Secretary to detain the individual "any time after" her release from criminal custody. *See* Pet. 9-10. To the extent the statute is ambiguous on this issue, the government argues that the Board of Immigration Appeals ("BIA") decision adopting this interpretation in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), warrants *Chevron* deference. *See* Pet. 8, 9. However, as the Ninth Circuit correctly held, the government's expansive reading violates the plain

language by rendering the "when . . . released" language superfluous. Indeed, the government admits that, under its interpretation, the "when . . . released" clause has no significance with respect to its detention authority. *See* Pet. 9. Instead, the government would apply mandatory detention to an individual who completed a criminal sentence for a minor crime more than a decade ago, has satisfied any conditions of probation or parole, and has been living peaceably and openly in the community; is eligible for relief from deportation; and could prove that she is neither a flight risk nor a danger. The plain language of Section 1226(c) and all indications of its legislative purpose demonstrate that the mandatory detention of such individuals is not what Congress intended.

Second, the government argues that "when . . released" is ambiguous and can be read to mean "in the event that" the person is released, instead of requiring prompt detention. *See* Pet. 9 n.3. However—as the BIA itself recognized in *Matter of Rojas*—when read in context, the term "when" clearly requires a degree of immediacy. Thus, there is no basis for any deference to the government's *post hoc* litigation position, which conflicts with the agency's reading.

Third, the government argues that DHS's failure to detain the person at the time of her release is of no consequence under this Court's "loss of authority" doctrine, which provides that where a statutory deadline does not specify otherwise, the government does not lose authority to detain when it fails to meet the deadline. *See* Pet. 11-12. However, this argument is misplaced: the court of appeals'

ruling does *not* deprive DHS of detention authority, and DHS retains the authority to detain any individual in removal proceedings. The only consequence is to afford individuals who have not been promptly detained, and thus have been living at large, a hearing in which they bear the burden to prove that they are neither a risk of flight nor a threat to the community. The decision whether to maintain custody or release the person (and any conditions to attach to release) remains in the hands of an immigration judge.

A. The Plain Language and Purpose of the Statute Make Clear that Mandatory Detention Applies Only To Individuals Whom DHS Detains "When . . . Released" From Criminal Custody.

As the Ninth Circuit correctly held, Section 1226(c) "unambiguously imposes mandatory detention without bond only on those aliens taken by the [Secretary] into immigration custody 'when [they are] released' from criminal custody." App. 5a. As such, it does *not* apply to individuals, like Plaintiffs, who were only detained by DHS after returning to their homes and communities, months or even years after their release.

The plain language of the statute compels this conclusion, and that conclusion is reinforced by the statute's context and structure. As explained above, Section 1226(c)(1) directs DHS to take custody of a noncitizen who is "inadmissible" or "deportable" due to certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Section 1226(c)(2) goes on to prohibit the release of "an alien

described in paragraph (1)"—which includes the "when . . . released" language. *Id.* § 1226(c)(2). Thus, when the paragraphs are read together, the plain language of the statute clearly imposes mandatory detention of noncitizens who are removable due to certain crimes and whom DHS detains "when [they are] released" from criminal custody.

Petitioners maintain that the "when . . . released" clause does not define who must be detained, but instead solely "defines when an *action of the Secretary* should occur" and that "when" effectively means "any time after." *See* Pet. 9-10. But this reading reduces the "when . . . released" clause to mere surplusage. *See TRW Inc., v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." (citation omitted)). As many courts recognize, "permitting ICE to detain an alien under 8 U.S.C. § 1226(c) anytime after the alien is released from custody would render the phrase 'when the alien is released' meaningless." *Deluis-Morelos v. ICE Field Office Dir.*, No. 12CV-1905JLR, 2013 WL 1914390, at *6 (W.D. Wash. May 8, 2013); *see also Castañeda v. Souza*, 810 F.3d 15, 41 (1st Cir. 2015) (en banc order affirming district court decision by evenly divided vote) (Barron, J.). As one district court responded,

> when else could the Attorney General take an alien into custody except when he or she is released? To read the statute in a manner that allows the Attorney General to take a criminal alien into custody without regard to the

> timing of the alien's release from custody would render the 'when the alien is released' clause redundant and therefore null.

Khodr v. Adduci, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010) (citation omitted). The government's inability to give any independent meaning to the "when . . . released" clause only confirms what the BIA itself acknowledged in *Matter of Rojas*: that its interpretation simply renders the "when . . . released" clause superfluous. 23 I. & N. Dec. at 125.

Moreover, as the Ninth Circuit concluded, "[i]f Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, Congress would have said so, given that it spoke with just such directness elsewhere in the IIRIRA." *See* App. 21a-22a (quoting *Castañeda*, 810 F.3d at 38 (Barron, J.) (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added) (alteration in original))).

The government, relying on *Matter of Rojas*, proposes an unnatural reading of "aliens described in paragraph (1)" that excises the "when . . . released" clause from paragraph (1) altogether. *See Rojas*, 23 I. & N. Dec. at 125. However, the agency is not permitted to pick and choose from the provisions that constitute paragraph (1). "We must presume that Congress selected its language deliberately, thus intending that 'an alien described in paragraph (1)' is just that—*i.e.* an alien who committed a covered offense *and* who was taken into immigration custody 'when . . . released.'" App. 14a (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see*

also Castañeda, 810 F.3d at 36 (Barron, J.) ("Congress clearly intended for the cross-reference in (c)(2) to refer to aliens who have committed (A)-(D) offenses *and* who have been taken into immigration custody 'when . . . released' from criminal custody, in accordance with the Attorney General's duty under (c)(1)."") (emphasis added); *Saysana v. Gillen*, 590 F.3d 7, 14-16 (1st Cir. 2009) (holding that the "when . . . released" clause cannot be excised from the definition of individuals subject to mandatory detention).

Had Congress wanted to include a provision barring release of any person who committed a predicate act without regard to whether they had been released and were now back living with their families, Congress could simply have required the mandatory detention of "an alien described in subparagraphs (1)(A)-(D)." The fact that Congress referred to *all* of "paragraph (1)", and *not* its subparagraphs, evinces its intent to include all of "paragraph (1)," including the "when . . . released" clause.[13]

Limiting mandatory detention to individuals detained "when . . . released" from custody is

---

[13] Petitioners note that the Tenth Circuit in *Olmos v. Holder*, 780 F.3d 1313, 1320 (10th Cir. 2015), relied on a provision of the INA—8 U.S.C. § 1153(b)(5)(B)(i)—where Congress referred to "a new commercial enterprise described in subparagraph (A)", but the context showed it was referring only to the subparts (i) and (ii). *See* Pet. 10. However, the subparts (i) and (ii) were the only language in the statute that could arguably "describe" a "new commercial enterprise." *See also* App. 14a-15a.

consistent with the "structure and purpose of the statute." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (internal quotation omitted). The mandatory detention provision, Section 1226(c), is an exception to the general detention provision laid out in Section 1226(a). *See* App. 17a-18a. Exceptions to general rules are to be narrowly construed. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

Moreover, the plain reading of Section 1226(c) effectuates Congress's purpose. "The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." *Saysana*, 590 F.3d at 17. Congress instructed that certain individuals should be detained without even an opportunity to prove that they are neither a flight risk nor a danger, but only when they are detained promptly, with no significant break in custody. Where, by contrast, DHS does not promptly take individuals into custody, but allows them to live at large, they may still be detained when placed in removal proceedings. The only consequence is that such individuals are afforded a hearing at which they can seek release on bond only if they can prove that they pose neither a flight risk nor danger. Thus, "the 'when released' language serves [the] . . . limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses." *Id.*

Instead of focusing mandatory detention on high-risk individuals who are coming out of criminal custody, the government's expansive interpretation would sweep up individuals who have been living peaceably in the community for more than a decade, and pose neither a danger nor a flight risk. For example, Eduardo Vega Padilla, a named plaintiff in *Preap*, has been a lawful permanent resident since he came to the United States as a toddler in 1966. He has five U.S. citizen children and six U.S. citizen grandchildren. During a difficult period in his life, Mr. Padilla was convicted of possession of a controlled substance in 1997 and 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was then convicted of possessing a firearm while having a prior felony conviction and sentenced to six months in jail. He was released in 2002. In August 2013, after *eleven years* of peaceful and crime-free life as a lawful permanent resident, DHS officers arrested Mr. Padilla at his home and held him in mandatory detention for the next six months. Ultimately, in February 2013, Mr. Padilla received a bond hearing pursuant to *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), where the immigration judge found he did not pose a danger or flight risk, and ordered him released on a $1,500 bond—the minimum amount permitted by the statute. *See* Responsive Br. of Pls.-Appellees 9-10, *Johnson v. Preap*, Nos. 14-16326, 14-16779 (9th Cir. filed Feb. 2, 2015). As the plain language of the "when . . . released" clause indicates, Congress did not intend that individuals like Mr. Padilla be subject to mandatory detention without any individualized custody review.

This example also shows how the "when . . . released" requirement of Section 1226(c) makes practical sense. When an individual is taken into custody immediately upon release from criminal custody, there will be little evidence available, making a hearing in which the noncitizen must prove that she is not a flight risk or a danger unlikely to result in release. Where, by contrast, an individual has been released and is living in the community, it was logical for Congress to provide for a hearing where the immigration judge decides whether the detainee's conduct during her period of release is sufficient to rebut the presumption that she is a danger and flight risk.

Petitioners' assertion that Congress was concerned with "'detaining . . . *all* criminal aliens,'" *see* Pet. 11 (quoting *Rojas*, 23 I. & N. Dec. at 122) (original emphasis), is incorrect. Section 1226(c) does not cover all criminal offenses that render persons deportable. For example, it does not encompass persons subject to deportability for domestic violence offenses under 8 U.S.C. § 1227(a)(2)(E). Nor would a person charged as inadmissible based on a firearms offense be subject to Section 1226(c)(1), in contrast to a person charged as deportable for such an offense. And of course Congress chose to impose mandatory detention only on individuals detained "when . . . released" from criminal custody. In short, Congress chose to impose mandatory detention not on all those with criminal convictions, but only on a select group of individuals under particular circumstances.[14]

---

[14] The government's interpretation also raises serious constitutional concerns as it extends Section 1226(c)'s

B. As Determined by Both the Court of Appeals and the Board of Immigration Appeals, "When" Does Not Mean "In the Event that."

In arguing that the court of appeals should have deferred to its interpretation, the government asserts in a footnote that the term "when" is ambiguous and could refer to either "at or around the same time" or "in the event that." Pet. 9 n.3. However, the BIA did not base its conclusion in *Matter of Rojas* on a determination that the "when . . . released" clause is ambiguous in this respect. Petitioners' argument conflicts with the BIA's own conclusion that the statute "does direct the [Secretary] to take custody of aliens *immediately upon their release* from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). The

---

categorical deprivation of physical liberty to individuals whose last contact with the criminal justice system occurred years ago, and who have fully rehabilitated and re-established ties to their families and communities. As a panel of the First Circuit explained, "those who have resided in the community for years after release cannot reasonably be presumed to be dangerous or flight risks . . . particularly so given the breadth of offenses to which 1226(c) applies." *Castañeda v. Souza*, 769 F.3d 32, 47 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Jan. 23, 2015), *on reh'g en banc*, 810 F.3d 15 (1st Cir. 2015). Subjecting an individual to detention under these circumstances, when she does not pose a flight risk or danger, would violate due process. *See id.* Under principles of constitutional avoidance, Section 1226(c) must therefore be construed to avoid the serious due process concerns presented by the mandatory detention of individuals detained regardless of when they were released from criminal custody. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

government may not now construct *post hoc* justification for the agency's interpretation, but must rely upon the rationale used by the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").[15]

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c).

Petitioners contend that their interpretation is consistent with this Court's case law holding that where a statutory deadline does not specify otherwise, the government does not lose authority to detain when it fails to do so within the required time. *See* Pet. 11-12 (citing, *inter alia*, *United States v.*

---

[15] Even if Section 1226(c) were ambiguous—and it is not—the BIA's interpretation in *Matter of Rojas* warrants no *Chevron* deference because it leads to arbitrary and capricious results that are "unmoored from the purposes and concerns" of the statute. *Judulang v. Holder*, 565 U.S. 42, 64 (2011). Under the BIA's view, anyone who has been in custody for a relevant offense at any time after the statute's 1998 effective date—i.e., nearly 20 years ago and counting—is subject to mandatory detention at whatever point in the future DHS detains them. This reading would arbitrarily deny bond hearings to individuals who have returned to their families and communities, and lived peaceably and openly there for years. In such cases, an immigration judge will be able to fully evaluate flight risk and danger based on evidence accumulated from their time in the community.

Montalvo-Murillo, 495 U.S. 711, 717-18, 720 (1990) (holding that even where the government fails to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance, the government may still detain that person before trial, as holding otherwise would "bestow upon the defendant a windfall" and impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants.")).

The "loss of authority" principle does not apply to this case for three reasons.

First, the government does not in fact lose its authority to detain under the court of appeals' interpretation. The government retains its authority to detain. The only consequence of failing to do so promptly is that the individual is afforded a custody hearing, after which an immigration judge will decide whether to maintain custody or release, depending on whether the individual has proved she does not pose a flight risk or danger. Thus, the government suffers no "sanction" under the Ninth Circuit's rulings, *see* App. 25a-26a, nor does the public suffer the "severe penalty" of the release of dangerous persons. The general detention framework provides ample authority to detain any individual who is a flight risk or danger to society. Indeed, it authorizes detention unless the individual can affirmatively prove a negative—that she is neither a flight risk nor a danger. *See Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) (explaining that bond must be denied if a person is a danger to the community); *Guerra*, 24 I. & N. Dec. at 38 (describing danger and flight risk test for bond). Because Section

1226(c) curtails, rather than expands, the government's discretion over detention, the effect of the Ninth Circuit's ruling is to reinstate the government's general authority under Section 1226(a) to detain or release individuals who are not timely detained under Section 1226(c).

Second, unlike the deadlines at issue in the cases applying this principle, Section 1226(c)'s "when . . . released" language sets forth a substantive description of the persons subject to the statute and not a mere procedural deadline. The "when . . . released" clause expressly describes *who* is subject to government action in the first place. In contrast, the deadlines in the "loss of authority" cases do not define the object of statutory regulation. *See Montalvo-Murillo*, 495 U.S. at 714; *Brock v. Pierce Cty.*, 476 U.S. 253, 260 (1986); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62-65 (1993). Applying the principle here would contravene express statutory language limiting the persons subject to the statute.

Third, the "loss of authority" principle does not apply, as the Ninth Circuit recognized, *see* App. 26a-27a, because it would lead to an outcome that is contrary to the detention framework Congress sought to implement. Congress enacted the "when . . . released" clause in order to ensure a continuous chain of custody between the criminal justice and immigration enforcement systems for noncitizens with certain convictions, to avoid people being released who present a danger to the community or a risk of absconding. Permitting the government to delay apprehension and instead detain people months or years after their return to their

communities, without affording them any opportunity to show that they are not a flight risk or a danger, contravenes the purposes and design of the statute.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue
Seattle, WA 98104-2244

Robert Pauw
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98103

Devin T. Theriot-Orr
SUNBIRD LAW, PLLC
1001 4th Avenue, Suite 3200
Seattle, WA 98154

Emily Chiang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON
901 5th Avenue, Suite 630
Seattle, WA 98164

Counsel for Khoury Respondents

Michael K.T. Tan
Counsel of Record
Judy Rabinovitz
Cecillia Wang
Omar Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
mtan@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Counsel for Preap and Khoury Respondents

Julia Harumi Mass
AMERICAN CIVIL LIBERTIES
FOUNDATION OF NORTHERN
CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Anoop Prasad
Jingni (Jenny) Zhao
ASIAN AMERICANS
ADVANCING JUSTICE –
ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, CA 94111

Ashok Ramani
Grace Y. Yang
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111

Counsel for Preap Respondents

Dated: August 8, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 23 2017
OFFICE OF THE CLERK

No. 16-1363

In the Supreme Court of the United States

ELAINE C. DUKE, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. This Court's review is warranted now 4
B. The Ninth Circuit's decisions are wrong 7

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 9
Castañeda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 2
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 10
Demore v. *Kim*, 538 U.S. 510 (2003) 10
Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 2, 6
Jennings v. *Rodriguez*, cert. granted, No. 15-1204 (oral argument scheduled for Oct. 3, 2017) 4
Khodr v. *Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010) 8
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016) 2, 6
Ohio Forestry Ass'n, Inc. v. *Sierra Club*, 523 U.S. 726 (1998) 3
Olmos v. *Holder*, 780 F.3d 1313 (10th Cir. 2015) 2, 6
Rojas, In re, 23 I. & N. Dec. 117 (B.I.A. 2001) 4, 7, 10, 11
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 11
Sylvain v. *Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) 2, 6
TC Heartland LLC v. *Kraft Food Brands Grp. LLC*, 137 S. Ct. 614 (2016) 5
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 9, 10

Statutes and rules: Page

8 U.S.C. 1226(a) 9
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) 7, 9
8 U.S.C. 1226(c)(2) 7
Sup Ct. R.:
Rule 10(a) 1
Rule 35.3 1

Miscellaneous:

No Sanctuary for Criminals Act, H.R. 3003, 115th Cong., 1st Sess. (2017):
§ 4(a)(2) 5
§ 4(a)(3)(C) 5

In the Supreme Court of the United States

No. 16-1363

ELAINE C. DUKE, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS[1]

v.

MONY PREAP, ET AL.

BRYAN WILCOX, ACTING FIELD OFFICE DIRECTOR, ET AL., PETITIONERS

v.

BASSAM YUSUF KHOURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's ruling that a gap in custody exempts a criminal alien from mandatory detention warrants certiorari: The decisions below present an important question of federal statutory interpretation over which the circuits are divided. See Sup. Ct. R. 10(a).

First, respondents do not dispute that the Ninth Circuit opened a lopsided circuit conflict. Every other

[1] Elaine C. Duke is automatically substituted for her predecessor, John F. Kelly. See Sup. Ct. R. 35.3.

court of appeals to decide the issue has held that a criminal alien does *not* become exempt from mandatory detention when there is a gap in custody, even if the gap lasts several years. See *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016); *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly). Indeed, the Ninth Circuit recognized that four of its sister circuits had "sided with the government," but it squarely rejected that position. Pet. App. 4a.

Second, respondents do not dispute that these cases present a pure question of statutory interpretation. The only reason the court of appeals affirmed the injunctions in these two cases is because it interpreted 8 U.S.C. 1226(c) to render a criminal alien exempt from mandatory detention whenever the government fails to take him into immigration custody "promptly" after release from criminal custody. Pet. App. 3a, 27a-28a, 59a. If the Ninth Circuit had interpreted the statute the same way as its sister circuits, it would have reversed.

Third, respondents do not deny that this question has considerable practical importance. They contend (Br. in Opp. 17) that the extent of the importance is uncertain because "there is no factual record on which to assess the government's assertions about the practical implications of the court of appeals' ruling." But it does not require a factual record (or further factual development) to see that this case is important. The circuit conflict and the fact that respondents brought these two cases in the Ninth Circuit as class actions demonstrate that the issue is a broadly recurring one. Nor would further factual development regarding the extent to

which States and localities make it more difficult for the Department of Homeland Security (DHS) to take criminal aliens into custody "significantly advance [the Court's] ability to deal with the legal issue[] presented" or "aid" in its resolution. *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 737 (1998) (citation omitted). Indeed, as the *Preap* respondents themselves put it in the district court, "the existence of state statutes and local ordinances that came into effect nearly two decades after Congress promulgated Section 1226 cannot logically affect what Congress intended the words of Section 1226(c) to mean." *Preap* D. Ct. Doc. 34, at 19 n.15 (Feb. 21, 2014). The *Preap* respondents further asserted that "[t]he difficulty of detaining noncitizens upon their release that the Government argues exists also has no bearing on statutory interpretation and whether the 'when . . . released' [clause] is ambiguous." *Ibid.* In any event, the record already includes evidence of state and local laws prohibiting compliance with detainer requests. See *Preap* D. Ct. Doc. 24, at 20-23 (Feb. 7, 2014). This Court has ample context to decide the meaning of Section 1226(c).

That issue is a pressing one. Removing criminal aliens has always been a top priority in immigration enforcement, and Congress enacted Section 1226(c) to prevent criminal aliens from potentially being released on bond and thereafter fleeing or committing further crimes. See Pet. 15-16. The decisions below nonetheless guarantee a bond hearing to every alien in the Ninth Circuit with the requisite criminal history, unless DHS takes the alien into custody promptly. And for every such alien in the Central District of California and the Western District of Washington, the injunctions here require bond hearings unless DHS takes them into custody "immediately," *id.* at 27a, 59a, although the

Ninth Circuit indicated that a "very short period" between release and detention may be permissible in certain circumstances, *id.* at 27a; see *id.* 23a ("some degree of immediacy"). Respondents do not deny that gaps in custody are inevitable because of resource constraints. The decisions below thus invite the very risk of recidivism and flight that Section 1226(c) is meant to prevent.

A. This Court's Review Is Warranted Now

In opposing certiorari, respondents primarily contend (Br. in Opp. 13-19) that review would be "premature." They contend, specifically, that (1) *Preap* is an appeal from a preliminary injunction, not a final injunction; (2) the House of Representatives has passed a bill that, if enacted into law, would reverse the Ninth Circuit's rule; (3) the Ninth Circuit has not definitively resolved the meaning of "promptly"; and (4) this Court is currently considering a different question about Section 1226(c) in *Jennings* v. *Rodriguez*, cert. granted, No. 15-1204 (oral argument scheduled for Oct. 3, 2017). These asserted reasons do not justify denying review.

1. The fact that *Preap* arises from a preliminary injunction does not warrant the denial of certiorari. There is nothing tentative, preliminary, or uncertain about the court of appeals' holding in *Preap* that a criminal alien becomes exempt from mandatory detention unless he is taken into immigration custody promptly. The court decisively resolved the question in the case, even concluding that the statute was "unambiguous[]," Pet. App. 5a, notwithstanding that four sister circuits and the Board of Immigration Appeals (BIA) had all reached a contrary conclusion. See *In re Rojas*, 23 I. & N. Dec. 117 (2001). The court also applied the *Preap* rule to affirm in *Khoury*, which arises from a permanent injunction following a grant of summary judgment to the

Khoury respondents. See Pet. App. 58a-59a. *Khoury* thus is not interlocutory at all.[2]

2. Respondents contend (Br. in Opp. 13-14) that the House of Representatives' passage of the No Sanctuary for Criminals Act, H.R. 3003, 115th Cong., 1st Sess. § 4(a)(3)(C) (2017), suggests that this Court's review is unwarranted. If enacted into law, that bill would reverse the Ninth Circuit's decisions by replacing "when the alien is released" in Section 1226(c) with "any time after the alien is released." *Ibid.* That bill thus indicates that the House is aware of the issue, disagrees with the proposition that a gap should exempt a criminal alien from mandatory detention, and has concluded that the issue is sufficiently important to justify reversal. But that bill is not limited to this one issue; it addresses a variety of issues relating to immigration enforcement and detention, and the interaction between the federal government and States and localities. For example, if enacted, it would also reverse the Ninth Circuit's decision in *Rodriguez*, currently under review in this Court. See *id.* § 4(a)(2) (addressing length of detention). And it is far from certain whether this bill will ever become law. Cf. *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 614 (2016) (No. 16-341) (granting certiorari notwithstanding pending bill to resolve the issue); Br. in Opp. at 29-30, *TC Heartland*, *supra* (No. 16-341). In the meantime, the Ninth Circuit's decisions have created a direct circuit conflict leading to disparate treatment of similarly situated aliens.

---

[2] There is no merit to respondents' contention (Br. in Opp. 16 n.6) that *Khoury* does not warrant review because it is non-precedential. *Preap* is precedential, and the Ninth Circuit resolved *Khoury* (after final judgment) by applying *Preap*'s legal rule. Pet. App. 58a-59a.

3. There is no reason for this Court to wait for the Ninth Circuit to explicate further the term "promptly." The circuit conflict here is over whether a criminal alien becomes exempt from mandatory detention when there is a gap in custody. Four circuits say no; the Ninth Circuit says yes. Moreover, the circuits that have held that a gap is immaterial have reached that result in cases where the onset of custody clearly would not satisfy the Ninth Circuit's view of "promptly": the gap lasted multiple years. *Low*, 804 F.3d at 611; *Olmos*, 780 F.3d at 1324-1327; *Sylvain*, 714 F.3d at 161; *Hosh*, 680 F.3d at 382-384. The Ninth Circuit, by contrast, expressly rejected the position of its sister circuits and affirmed injunctions requiring immediacy. Pet. App 3a, 59a. The circuit conflict thus will persist regardless of how precisely the Ninth Circuit might ultimately define "promptly." The Ninth Circuit's gloss on "promptly" also would shed little light on the merits here, because that word does not appear in Section 1226(c).

4. The pendency of *Rodriguez* provides no basis for denying certiorari. The two cases present different questions about Section 1226(c), without material overlap. The question here is whether certain criminal aliens are exempt from mandatory detention. By contrast, *Rodriguez* addresses the question whether mandatory detention expires and a bond hearing is required after six months. See Gov't Br. at i, *Rodriguez*, *supra* (No. 15-1204). The *Rodriguez* issue thus only arises for aliens who were subject to mandatory detention in the first place. This case also focuses on specific statutory language that is not at issue in *Rodriguez*: the meaning

of "an alien described in paragraph (1)" and "when the alien is released." 8 U.S.C. 1226(c).[3]

B. The Ninth Circuit's Decisions Are Wrong

Respondents contend (Br. in Opp. 20-33) that the court of appeals' decisions below are correct, but those arguments are appropriately presented to this Court on plenary review. Indeed, even if the Ninth Circuit's decisions were correct, they would still warrant review because four circuits have adopted the opposite position. In any event, respondents' arguments lack merit.

1. Respondents incorrectly argue (Br. in Opp. 22-28) that Section 1226(c)'s plain language dictates their position. Paragraph (1) directs the Secretary of Homeland Security to take into custody any alien with the requisite criminal history, specified in four lettered subparagraphs, "when the alien is released." 8 U.S.C. 1226(c)(1). Paragraph (2) then prohibits the release of "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). As the BIA explained in *Rojas*, "an alien described in paragraph (1)" is most naturally read to refer "to an alien described by one of four subparagraphs, (A) through (D)." 23 I. & N. Dec. at 121. Those subparagraphs describe individuals based on their own characteristics and conduct: their criminal history.

By contrast, the clause beginning "when *the alien* is released" does not describe who the alien is; rather, it takes as a given that "the alien" has already been described. 8 U.S.C. 1226(c)(1) (emphasis added). The "when the alien is released" clause instead specifies

---

[3] If the Court concludes that the briefing and presentation of this case would benefit from a decision in *Rodriguez*, it could hold this petition and then grant certiorari after *Rodriguez* is decided. But that would provide no basis for denying review altogether.

when an act affecting such an alien should occur—when the Secretary should take the alien into custody.

Respondents have no real response. They elide the words "the alien" from the clause and assert (Br. in Opp. 32) that "[t]he "when . . . released" clause expressly describes *who* is subject to government action in the first place." But the full statutory text—"when the alien is released"—makes little sense unless the Secretary already knows who "the alien" is because he has already been fully described, and thus already knows who should be taken into custody in the first place.

Contrary to respondents' assertion (Br. in Opp. 23-24), reading "when the alien is released" to specify the situation in which the Secretary must take criminal aliens into custody does not render that phrase superfluous. Respondents ask, "when else could the [Secretary] take an alien into custody except when he or she is released?" *Id.* at 23 (quoting *Khodr* v. *Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010)). The answer is that the Secretary otherwise could potentially take the alien into custody *before* he is released. For aliens who are in federal criminal custody, this provision ensures that they will complete their sentences before being transferred from one federal custodian to another. For aliens who are in state custody, this provision makes clear that the Secretary should not attempt to wrest them from state hands, and instead should wait for the coordinate sovereign to release them.

2. Even if "when the alien is released" imposes a deadline for the Secretary to act, the Secretary's failure to take a criminal alien into custody within that timeframe would not give the alien a windfall by making him

exempt from mandatory custody.[4] Rather, it would simply mean that the government missed the deadline. See *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-720 (1990); see also *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003).

Respondents contend (Br. in Opp. 31-33) that those cases are inapplicable here because DHS would not lose its authority to detain criminal aliens under the Ninth Circuit's interpretation: DHS would still have authority to detain them under 8 U.S.C. 1226(a), although it must provide them with a bond hearing and thus the criminal alien may ultimately be released. But respondents misapprehend the rationale of this Court's precedents. They reflect the common-sense point that when Congress has concluded that something is so important that it has affirmatively required the government to act by some deadline, this Court will assume (absent indication to the contrary) that it is better for the government to act late than never at all if the government misses the deadline. For example, the Court held in *Montalvo-Murillo* that "a provision that a detention hearing 'shall be held immediately upon the [detainee's] first appearance before the judicial officer' did not bar detention after a tardy hearing.'" *Barnhart*, 537 U.S. at 159 (brackets in original) (quoting *Montalvo-Murillo*, 495 U.S. at 714). This case is strikingly similar: Congress has mandated that custody of criminal aliens without bond shall begin "when the alien is released." 8 U.S.C. 1226(c)(1). If the government is tardy, detention is still mandatory.

It is no answer (Br. in Opp. 23-24) to suggest that, if the government is unable or fails to take a criminal alien

---

[4] "When the alien is released" can also be read to mean "in the event the alien is released," and thus not to impose a deadline. See n.5, *infra*.

into custody immediately after release, the alien is exempt from mandatory custody but the government would still have authority to detain the alien *if it gives him a bond hearing* and the alien is denied bond. The point of Section 1226(c) is to eliminate bond hearings for criminal aliens. See *Demore* v. *Kim*, 538 U.S. 510, 520 (2003). The action that Congress mandated is mandatory custody, not discretionary custody.

Respondents are also wrong to claim (Br. in Opp. 32) that "when the alien is released" is both a deadline *and* a substantive limitation on the set of criminal aliens who must be detained. That is just another way of saying that the consequence of missing the deadline is that the alien becomes exempt from the mandate Congress imposed. That is precisely the argument this Court's decisions reject. *E.g.*, *Montalvo-Murillo*, 495 U.S. at 717 ("We reject the contention that if there has been a deviation from the time limits of the statute, the hearing necessarily is not one conducted 'pursuant to the provisions of subsection (f).'"). In any event, respondents' premise is wrong because "when the alien is released" specifies *when* DHS should begin detention, not *whom* it should detain.

3. At most, Section 1226(c) is ambiguous on this point. If so, the Court should defer to the BIA's decision in *Rojas* and reverse the Ninth Circuit. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Contrary to respondents' contention (Br. in Opp. 29), the government's position is consistent with *Rojas*. *Rojas* holds that a criminal alien does not become exempt from mandatory custody if

there is a gap in custody. 23 I. & N. Dec. at 120. The government is advancing the same position here.[5]

Respondents contend that *Rojas* is "unmoored from the purposes and concerns" of the statute, because it is theoretically possible that a nearly 20-year gap could occur. Br. in Opp. 30 n.15 (citation omitted). But in *Rojas*, the BIA relied on not only Section 1226(c)'s text, but also its history, context, and purpose. Among other things, the BIA explained that "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122. And the BIA explained that respondents' interpretation creates practical problems. "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Id.* at 128. That practical point looms large here, because the injunctions in these cases exempt criminal aliens from mandatory detention if DHS does not take them into custody "immediately," Pet. App. 27a-28a, and the Ninth Circuit would at most permit a "very short" gap, *id.* at 27a. *Rojas* thus warrants deference, and is correct even without it.

---

[5] Respondents note (Br. in Opp. 29-30) that the BIA did not interpret "when the alien is released" to mean "in the event the alien is released." But the government is not asking for deference to the BIA on that point, which is an alternative argument further illustrating that the Ninth Circuit's decisions are wrong. See Pet. 9 n.3. The principle of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), also does not apply here because these cases do not involve direct review of agency decisions; they are habeas corpus actions.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

AUGUST 2017

No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ZACHARY D. TRIPP
Assistant to the Solicitor General
TROY D. LIGGETT
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement:
A. Legal framework 2
B. Facts and procedural history 5
Summary of argument 8
Argument:
Criminal aliens do not become exempt from mandatory detention if the Department of Homeland Security does not take them into immigration custody immediately upon their release from criminal custody 13
I. Section 1226(c) is best interpreted not to reward criminal aliens with the opportunity for release if DHS does not arrest them immediately 13
A. Section 1226(c)'s text and structure show that criminal aliens do not become exempt from mandatory detention if DHS fails to arrest them immediately 13
B. The BIA's interpretation advances Congress's purpose of preventing flight and recidivism by criminal aliens 22
C. The BIA's interpretation avoids serious practical problems 25
D. This Court's decisions further confirm that the BIA's decision is correct 27
E. Section 1226(c)'s history shows that Congress intended to prohibit release of all aliens with the requisite criminal history 30
F. The court of appeals' counterarguments lack merit 35
II. The BIA's correct interpretation of the statutory scheme it administers warrants deference 39
Conclusion 41

TABLE OF AUTHORITIES

Cases: Page

Adams v. *Holder*, 692 F.3d 91 (2d Cir. 2012) 25
Arizona v. *United States*, 567 U.S. 387 (2012) 27
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 11, 28, 29
Brock v. *Pierce Cnty.*, 476 U.S. 253 (1986) 28
Bullard v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015) 21
Castañeda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 6, 19, 21
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 12, 39
Demore v. *Kim*, 538 U.S. 510 (2003) ..... *passim*
Forest Grove Sch. Dist. v. *T. A.*, 557 U.S. 230 (2009) 33
Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 6, 7, 17, 29, 40
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 39
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 2, 4, 13, 15
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018) 6, 25, 29, 40
Negusie v. *Holder*, 555 U.S. 511 (2009) 39
Olmos v. *Holder*, 780 F.3d 1313 (10th Cir. 2015) 6, 29, 40
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 28
Reid v. *Donelan*, 819 F.3d 486 (1st Cir. 2016), cert. denied, 138 S. Ct. 1547 (2018) 23
Rojas, In re, 23 I. & N. Dec. 117 (B.I.A. 2001) ..... *passim*
Scialabba v. *Cuellar de Osorio*, 134 S. Ct. 2191 (2014) 39
Sylvain v. *Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) 6, 7, 12, 23, 29, 40
Texas Dep't of Hous. & Cmty. Affairs v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) 33
Torres v. *Lynch*, 136 S. Ct. 1619 (2016) 14

Cases—Continued: Page

United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 11, 28, 30
United States v. *Willings & Francis*, 8 U.S. (4 Cranch) 48 (1807) 17
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 31

Statutes and regulations:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470 (8 U.S.C. 1252(a)(2)) 31
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1277 33
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 303(a), 110 Stat. 3009-585 ..... 14, 33
§ 303(b)(3), 110 Stat. 3009-586 34
Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 5049 32
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2, 22
8 U.S.C. 1103(a)(1) 2, 39
8 U.S.C. 1103(g) 2, 39
8 U.S.C. 1182(a) 24
8 U.S.C. 1225(b) 24
8 U.S.C. 1226(a) 2, 29, 36, 37
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) ..... *passim*
8 U.S.C. 1226(c)(1)(A)-(D) 9, 14
8 U.S.C. 1226(c)(2) ..... *passim*
8 U.S.C. 1227 24
8 U.S.C. 1227(a)(2)(A)(iii) 3

Statutes and regulations—Continued: Page

8 U.S.C. 1228 24
8 U.S.C. 1228(a)(3)(B) 18
8 U.S.C. 1229 24
8 U.S.C. 1229a 2, 24
8 U.S.C. 1229a(e)(2) 3
8 U.S.C. 1231 31
8 U.S.C. 1231(a)(4)(A) 18
8 U.S.C. 1252(a)(2) (1988) 12, 31, 32
8 U.S.C. 1252(a)(2)(A) (1988 & Supp. IV 1992) 32
8 U.S.C. 1252(a)(2)(B) (1988 & Supp. IV 1992) 32
8 U.S.C. 1256(a) 25
Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751 32
6 U.S.C. 202(3) 2
6 U.S.C. 251 2
6 U.S.C. 271(b) 2
6 U.S.C. 542 note 2
6 U.S.C. 557 2
8 U.S.C. 1551 note 2
18 U.S.C. 3282(a) 20
28 U.S.C. 2401(a) 20
8 C.F.R.:
Section 3.19(h) 33
Section 236.1(c)(1)(i) 4
Section 236.1(c)(8) 2
Section 236.1(d)(1) 2
Section 242.2(c)(1) (1991) 12
Section 242.2(c)(1) 31
Section 287.7(a) 26
Section 287.7(d) 26

Regulations—Continued: Page

Section 1003.19 2
Section 1003.19(h)(2)(i) 4
Section 1236.1(c)(1)(i) 4
Section 1236.1(d)(1) 2

Miscellaneous:

55 Fed. Reg. 24,859 (June 19, 1990) 31, 32
57 Fed. Reg. 11,568 (Apr. 6, 1992) 33
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1995) 34
ICE:
Fiscal Year 2016 ICE Enforcement and Removal Operations Report, https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf 26
Fiscal Year 2017 ICE Enforcement and Removal Operations Report, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf 26
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 22, 23, 26, 27, 37
Webster's Third New International Dictionary (2002) 17, 35

In the Supreme Court of the United States

No. 16-1363

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Preap* (Pet. App. 1a-57a) is reported (without the appendices) at 831 F.3d 1193. The opinion of the court of appeals in *Khoury* (Pet. App. 58a-59a) is not published in the Federal Reporter but is reprinted at 667 Fed. Appx. 966. The opinion of the district court in *Preap* (Pet. App. 60a-106a) is reported at 303 F.R.D. 566. The opinion of the district court in *Khoury* (Pet. App. 107a-138a) is reported at 3 F. Supp. 3d 877.

JURISDICTION

In both cases, the judgment of the court of appeals was entered on August 4, 2016, and a petition for rehearing was denied on January 11, 2017 (Pet. App. 139a-140a). On April 7, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2017, and the petition was filed

on that date. The petition for a writ of certiorari was granted on March 19, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Legal Framework

The Secretary of Homeland Security (Secretary) may issue a warrant for the arrest and detention of an alien, "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837 (2018).[1] Section 1226(a) further provides that, "[e]xcept as provided in subsection (c) of this section," the Secretary "may continue to detain the arrested alien" or "may release" him on bond or conditional parole. 8 U.S.C. 1226(a). An immigration officer at the Department of Homeland Security (DHS) initially determines whether to grant bond; the alien can then ask an immigration judge for a redetermination of that custody decision. See 8 C.F.R. 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1).

"Section 1226(c), however, carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837. Section 1226(c) requires the Secretary to detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and

---

[1] Congress has transferred from the Attorney General to the Secretary of Homeland Security the enforcement of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, but the Attorney General retains authority over the administration of removal proceedings under 8 U.S.C. 1229a and questions of law. See, *e.g.*, 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. The first directs the Secretary to arrest certain criminal and terrorist aliens:

> The [Secretary] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. 1226(c)(1). The referenced sections make an alien removable because of certain criminal history or terrorist acts. See 8 U.S.C. 1229a(e)(2) (defining "removable"). For example, 8 U.S.C. 1227(a)(2)(A)(iii) makes an alien removable if he has been convicted of an aggravated felony. Respondents do not dispute that they

have the requisite criminal history and therefore are removable under those provisions.

Paragraph (2) is entitled "Release," and it provides:

> The [Secretary] may release an alien described in paragraph (1) only if * * * release of the alien from custody is necessary to provide protection to a witness * * * and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

8 U.S.C. 1226(c)(2); see 8 C.F.R. 236.1(c)(1)(i), 1003.19(h)(2)(i), 1236.1(c)(1)(i). The witness-protection exception is the only exception, and it does not apply here. *Jennings*, 138 S. Ct. at 847. DHS is therefore prohibited from releasing respondents if they are "alien[s] described in paragraph (1)" of Section 1226(c). 8 U.S.C. 1226(c)(2).

The Board of Immigration Appeals (BIA) has interpreted the key phrase "an alien described in paragraph (1)," concluding that an alien fits within the meaning of that phrase if he is deportable or inadmissible under any of the four lettered subparagraphs in paragraph (1), *i.e.*, if he is removable because he has the requisite criminal history or has committed the requisite terrorist acts. *In re Rojas*, 23 I. & N. Dec. 117, 125 (2001) (en banc). Under the BIA's interpretation, the flush clause at the end of paragraph (1) (beginning "when the alien is released") does not "describe[]" the alien who is subject to mandatory detention, but rather identifies when the Secretary's duty to arrest that alien is triggered. *Id.* at 121. Therefore, the BIA explained, that clause does not narrow paragraph (2)'s prohibition against releasing criminal aliens during their removal proceedings. See *id.* at 120-125.

The BIA accordingly held in *Rojas* that an alien with the requisite criminal history does not become exempt from mandatory detention if he is not immediately taken into custody by DHS. 23 I. & N. Dec. at 127. After reviewing the statute's text, context, and history, as well as practical considerations, the BIA concluded that it would be "inconsistent with [the BIA's] understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by [DHS]." *Id.* at 124.

B. Facts And Procedural History

1. *The* Preap *case*. On December 12, 2013, the *Preap* respondents brought a putative class action in the United States District Court for the Northern District of California. Lead plaintiff Mony Preap is a lawful permanent resident alien with two drug convictions from 2006 that triggered mandatory detention under Section 1226(c). Pet. App. 63a-64a. He was released from criminal custody in 2006, and DHS took him into immigration custody in September 2013. *Ibid.*[2]

The district court certified a class consisting of all aliens in California "who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." Pet.

---

[2] Earlier in 2013, Preap had been arrested for inflicting severe corporal injury on a spouse or domestic partner, and had pleaded guilty to battery. Pet. App. 64a. That conviction did not trigger Section 1226(c). *Ibid.*

App. 8a. The *Preap* respondents contended that they were exempt from mandatory detention under Section 1226(c), notwithstanding that they had committed predicate offenses specified in that Section, on the theory that Section 1226(c)(2)'s detention mandate does not apply unless DHS takes the alien into custody immediately "when the alien is released." See *id.* at 3a-4a.

On May 15, 2014, the district court entered a preliminary injunction in favor of the *Preap* respondents. Pet. App. 60a-106a. The court agreed with their interpretation of Section 1226(c) and held that the class members were exempt from mandatory detention because DHS had not taken them into immigration custody "immediately upon release from criminal custody." *Id.* at 61a. The court entered a preliminary injunction requiring the government to provide bond hearings to all class members. *Ibid.*; see *id.* at 95a, 105a-106a.

The court of appeals affirmed. Pet. App. 1a-57a. The court recognized that four circuits had "sided with the government" by ruling that a gap in custody is irrelevant to the application of mandatory detention under Section 1226(c). *Id.* at 4a; see *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018); *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly on whether a criminal alien becomes exempt after a delay of several years). The court nonetheless rejected that position and declined to accord deference to the BIA's decision in *Rojas*. Instead, the court held that the "when the alien is released" clause in Section 1226(c)(1) unambiguously exempts a criminal

alien from mandatory detention under Section 1226(c)(2) unless he is taken into custody "promptly" upon his release. Pet. App. 6a. The court also rejected the government's argument that, even if the "when the alien is released" clause mandates action by DHS within a specified time and DHS does not act until later, the consequence is not to provide the criminal alien with the opportunity for release through a bond hearing. *Id.* at 23a-27a. But see *Sylvain*, 714 F.3d at 157-161 (accepting this argument); *Hosh*, 680 F.3d at 381-383 (same).

2. The *Khoury* case. On August 1, 2013, the *Khoury* respondents brought a putative class action in the United States District Court for the Western District of Washington, similarly contending that criminal aliens become exempt from mandatory detention if DHS does not arrest them immediately upon their release from criminal custody. Lead plaintiff Bassam Yusuf Khoury is a lawful permanent resident who has a 2011 conviction for attempted manufacture or delivery of a controlled substance, which triggers mandatory detention under Section 1226(c). *Khoury* D. Ct. Doc. 19, at 5 (Aug. 14, 2013). He was released in June 2011, and DHS arrested him in April 2013. Pet. App. 109a-111a.[3]

The district court certified a class consisting of all aliens in the Western District of Washington "who were subjected to mandatory detention under 8 U.S.C.

---

[3] Another named plaintiff, Alvin Rodriguez Moya, was arrested by DHS when he was at large following a drug conviction. He was later given a bond hearing under the Ninth Circuit decision at issue in *Jennings*, and released. See *Khoury* D. Ct. Doc. 54, at 1-2 (May 8, 2015). After his release, Rodriguez Moya was arrested for and found guilty of first-degree attempted murder of his ex-girlfriend, and first-degree murder of her new boyfriend. See Jury Verdict, *State* v. *Rodriguez-Moya*, No. 3AN-15-03906CR (Alaska Sup. Ct. Dec. 6, 2017); Order Denying Mot. for a New Trial, at 1-3 (Mar. 6, 2018).

§ 1226(c) even though they were not detained immediately upon their release from criminal custody." Pet. App. 58a-59a. And the court granted summary judgment to the respondents, declaring that Section 1226(c) "applies only to aliens who are detained immediately upon their release from criminal custody." *Id.* at 59a.

Relying on its decision in *Preap*, the court of appeals affirmed. Pet. App. 58a-59a.

3. The court of appeals denied rehearing en banc in both cases. Pet. App. 139a-140a.

SUMMARY OF ARGUMENT

A detained criminal alien is subject to mandatory detention under Section 1226(c), regardless of whether DHS arrested him immediately upon his release from criminal custody. Indeed, the court of appeals' holding that the consequence of DHS not arresting a criminal alien immediately is to furnish the alien a bond hearing —thus giving him the opportunity to be released and potentially commit further crimes or flee—is contrary to the statute's text, context, purpose, and history, as well as this Court's precedent interpreting similar provisions, and would give rise to serious practical problems. Moreover, the BIA has squarely rejected that interpretation of Section 1226(c). See *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). The BIA adopted by far the best reading of the statute, and at a minimum its decision warrants deference. The court of appeals' contrary decision should be reversed.

I. A. Paragraph (1) of Section 1226(c) mandates that the Secretary "shall" take custody of certain aliens, and paragraph (2) prohibits the Secretary from releasing "an alien described in paragraph (1)." 8 U.S.C. 1226(c). Paragraph (1) describes those aliens, in four

indented subparagraphs, in terms of their criminal history or terrorist activities. It provides that the Secretary must arrest "any alien who—is inadmissible" or "is deportable" because of specified criminal history or terrorist activities. 8 U.S.C. 1226(c)(1)(A)-(D). The Secretary therefore is prohibited from releasing from DHS custody "any alien who" is removable because he has the requisite criminal history.

Paragraph (1)'s further phrase "when the alien is released" does not describe an alien at all. That is the function of the proceeding four subparagraphs, which are introduced "any alien *who*." 8 U.S.C. 1226(c)(1) (emphasis added). Indeed, "when the alien is released" takes as a given that "the alien" has already been fully described. *Ibid.* Otherwise, the Secretary would not know who "the alien" is. That clause thus does not narrow the scope of the prohibition against release. Instead, it tells the Secretary what to do with respect to that previously-described alien: She should arrest him "when the alien is released." Accordingly, once DHS has arrested a covered criminal alien, DHS must continue detaining him, regardless of when the arrest occurred: The alien is "an alien described in paragraph (1)" and paragraph (2) expressly prohibits the Secretary from releasing him. 8 U.S.C. 1226(c)(2).

B. The statutory context and purpose reinforce the point that continued detention is mandatory regardless of whether DHS arrests a criminal alien immediately upon his release from criminal custody. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003). In particular, evidence showed that the

Immigration and Naturalization Service (INS) was slow in arresting criminal aliens and that, when it did, immigration judges would often release those aliens on bond—and they would thereafter frequently flee or reoffend. *Ibid.* Section 1226(c) eliminates the need for immigration judges to make inherently difficult predictions about which criminal aliens will flee or reoffend, and entirely eliminates the risk that criminal aliens will do so by mandating continued detention of any alien with the requisite criminal history.

Under the BIA's decision in *Rojas*, a criminal alien does not become exempt from that mandate simply because DHS cannot or does not arrest him immediately upon his release from criminal custody. The court of appeals' interpretation, by contrast, would reintroduce the very risks that Congress enacted Section 1226(c) to eliminate. For a substantial number of criminal aliens, it would put immigration judges back into the business of trying to predict which criminal aliens will pose a flight risk or danger, and thus reintroduce the risk that released criminal aliens will flee or reoffend. Moreover, a criminal alien would be rewarded with a bond hearing on the basis of a factor—a gap in custody—that has no connection to the alien's criminal history and is irrelevant for all other immigration purposes.

C. The court of appeals' interpretation also gives rise to significant practical problems because DHS cannot always be standing at the jailhouse door waiting to take custody of every criminal alien at the very moment he is released. As a matter of government resources, DHS may be unable to send agents to make an arrest at the precise time and place of release, wherever or whenever that may occur nationwide. Moreover, gaps in custody

are often caused by factors entirely beyond the government's control. In particular, DHS cannot send agents to arrest an alien immediately upon his release unless DHS knows when and where that is going to occur. But many jurisdictions do not provide that information to DHS, making it effectively impossible for DHS to arrest every criminal alien immediately upon his release.

D. This Court's precedents further underscore that rewarding a criminal alien with the opportunity to seek release is not a proper consequence of any delay in arresting him. This Court has repeatedly held that when Congress has determined that governmental action is so important that it "shall" occur within some specified time, but the government does not act until later, it is not appropriate for courts to order that the public be deprived of the benefits that Congress mandated the government's action to produce. See, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-158 (2003); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-721 (1990).

This common-sense principle strongly supports the BIA's interpretation. The whole point of Section 1226(c) is to protect the public by requiring the arrest of criminal aliens and prohibiting any opportunity for them to be released once they are arrested, and thus preventing criminal aliens from fleeing or committing further crimes during the pendency of their removal proceedings. Affording such criminal aliens the opportunity for release if the government is delayed in arresting them would completely subvert this scheme. "[A] dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous

criminals." *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013).

E. Congress's enactment of Section 1226(c) is also properly understood to ratify the government's preexisting view that continued detention is mandatory for any detained alien with the requisite criminal history, regardless of any gap in custody. Congress enacted Section 1226(c) against the backdrop of prior statutes mandating the arrest and prohibiting the release of aliens with certain criminal history. *E.g.*, 8 U.S.C. 1252(a)(2) (1988). Moreover, the government had issued binding regulations interpreting the general prohibition against release in those provisions to extend to any detained alien with the requisite criminal history, regardless of any gap in custody. *E.g.*, 8 C.F.R. 242.2(c)(1) (1991).

In light of that historical and regulatory backdrop, if Congress had wanted to create a new gap-in-custody exception, it would have clearly expressed that change in law. Congress did nothing of the sort. Section 1226(c) is thus properly understood to provide that detention is mandatory for any detained alien with the requisite criminal history, regardless of any gap in custody.

II. The BIA thus adopted by far the best interpretation of Section 1226(c) in its decision in *Rojas*. If anything, in light of the statutory text, context, purpose, and history, and this Court's precedents addressing the remedy for governmental delay, the BIA's interpretation is unambiguously correct. At a minimum, the BIA's interpretation is reasonable, and its decision is therefore binding under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

CRIMINAL ALIENS DO NOT BECOME EXEMPT FROM MANDATORY DETENTION IF THE DEPARTMENT OF HOMELAND SECURITY DOES NOT TAKE THEM INTO IMMIGRATION CUSTODY IMMEDIATELY UPON THEIR RELEASE FROM CRIMINAL CUSTODY

Respondents have the requisite criminal history to trigger mandatory detention under Section 1226(c), and the only exception to that mandate does not apply here. Accordingly, Section 1226(c) mandates that, once DHS has arrested respondents, they must remain in detention during their removal proceedings. Any delay by DHS in arresting them does not exempt them from mandatory detention.

I. Section 1226(c) Is Best Interpreted Not To Reward Criminal Aliens With The Opportunity For Release If DHS Does Not Arrest Them Immediately

A. Section 1226(c)'s Text And Structure Show That Criminal Aliens Do Not Become Exempt From Mandatory Detention If DHS Fails To Arrest Them Immediately

1. Paragraph (2) of Section 1226(c) provides that the Secretary "may release an alien described in paragraph (1)" of that section "only if" the narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2). That exception does not apply here, and Section 1226(c) contains no other exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847 (2018). Respondents are therefore subject to mandatory detention during their removal proceedings because they are "alien[s] described in paragraph (1)." 8 U.S.C. 1226(c)(2).

"Describe" means "to represent or give an account of in words"; "express, explain, set forth, relate, recount, narrate, depict, delineate, portray," or, more loosely,

"to convey an image or notion of," "trace or traverse the outline of," or "convey an idea or impression of." *Torres v. Lynch*, 136 S. Ct. 1619, 1625 nn.3-4 (2016) (citations omitted) (collecting and quoting dictionary definitions).

Paragraph (1) describes aliens based on their personal criminal histories or terrorist activities. Paragraph (1) provides that the Secretary "shall take into custody any alien *who*—is inadmissible" or "is deportable" because of certain criminal or terrorist activity set forth in four indented and lettered subparagraphs. 8 U.S.C. 1226(c)(1)(A)-(D) (emphasis added). That clause is then followed by a distinct clause, set forth flush to the margin, stating: "*when* the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. 1226(c)(1) (emphasis added).[4]

In *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc), the BIA correctly held that the pertinent phrase in paragraph (2)'s prohibition against release—its reference to "an alien described in paragraph (1)"—refers "to an alien described by one of four subparagraphs, (A) through (D)." *Id.* at 121. As a matter of grammar, the word "who" followed by those subparagraphs constitute an adjectival clause that describes who such an alien is: "any alien *who—is* inadmissible" or "*is* deportable" for one of the enumerated reasons. 8 U.S.C. 1226(c)(1) (emphases added). Those subparagraphs thus set forth the characteristics of the individual aliens who are subject to mandatory detention under Section 1226(c). And

---

[4] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-585 (same structure as enacted).

they do so based on *the alien's own conduct* that sensibly warrants mandatory detention: his commission of a sufficiently serious criminal offense or terrorist act (*e.g.*, an aggravated felony) that renders him removable.

By contrast, the clause that follows—"when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense," 8 U.S.C. 1226(c)(1)—does not describe an alien at all, and thus does not narrow the scope of the prohibition against release. That clause does not express, set forth, or convey any attributes or characteristics of any person, in loose or precise terms. Indeed, that clause takes it as a given that "*the alien*" has already been fully described. *Ibid.* (emphasis added). The phrase "when the alien is released" makes little sense unless the Secretary already knows who "the alien" is, and thus knows who to arrest in the first place. *Ibid.*

Rather than modifying the noun "alien" by describing *who* is subject to arrest and mandatory detention, "when the alien is released" is an adverbial clause that modifies "shall take into custody." Specifically, that clause specifies "*when*" the duty of the Secretary to arrest a covered criminal alien applies. 8 U.S.C. 1226(c)(1). The Secretary thus has an obligation under paragraph (1) to take a covered alien into custody, and that obligation applies "when the alien is released." And under paragraph (2), once the Secretary arrests such a criminal alien, she must in any event continue detaining him during his removal proceedings, regardless of when his custody began.

A practical example illustrates the structural point. If somebody gave you a two-sentence shopping list saying "(1) Pick up milk, eggs, and cheese when the store opens"; and "(2) refrigerate the groceries described above," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store first opened, you could leave them out on the counter rather than put them in the refrigerator. The timing of when to get the groceries (when the store opens) does not say which groceries to buy. And that timing is entirely distinct from the need to refrigerate milk, eggs, and cheese, which exists regardless of when they are purchased.

Here, Congress's use of lettered subparagraphs to describe in precise terms who the Secretary shall arrest and detain makes the statute somewhat denser, but it does not alter this basic point. The Secretary has an obligation to arrest those criminal and terrorist aliens "when [they are] released." 8 U.S.C. 1226(c)(1). But whenever the Secretary arrests them, she must keep them in custody unless the witness-protection exception applies. 8 U.S.C. 1226(c)(2). And although Congress could have referred to aliens "described in subparagraphs (A) through (D) of paragraph (1)" instead of aliens "described in paragraph (1)," the language Congress used is simpler and perfectly accurate. There is nothing odd about Congress's use of the phrase "an alien described in paragraph (1)" to refer to any alien with the requisite criminal history, *ibid.*, because the adverbial clause "when the alien is released" appearing later in paragraph (1) does not describe the alien at all. So Congress did not need to be any more specific to direct that mandatory detention applies to any alien with the

requisite criminal history, regardless of whether DHS was delayed in arresting him in the first place.

The distinct role of the "when the alien is released" clause thus is manifested in its text, which is introduced by "when" and thereby separated from the prior description of "who." 8 U.S.C. 1226(c)(1). And it is manifested in the paragraph's structure, in which the "when the alien is released" clause is set out flush to the margin, following the four indented subparagraphs (A) through (D) that describe the aliens who are the object of the Secretary's duty. *Ibid.*

Moreover, regardless of its function within the structure of the statute, the phrase "when the alien is released" does not itself impose a duty that applies only at the moment of release. That clause standing alone could be read to mean either "at or during the time that" ("while") the alien is released, or "just after the moment that" he is released. *Webster's Third New International Dictionary* 2602 (2002) (*Webster's*) (capitalization altered); cf. *United States* v. *Willings & Francis*, 8 U.S. (4 Cranch) 48, 55 (1807) (Marshall, C.J.) ("That the term ['when'] may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration."); see *Hosh* v. *Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012) (finding "when" ambiguous in Section 1226(c)). In context, "when" is best understood to mean "while," imposing a duty to arrest a criminal alien that begins at the time the alien is first released and continues during any time the alien remains at large. The mandate to arrest thus does not have an expiration date, much less does it expire immediately. In any event, regardless of how "when" is construed,

once DHS has arrested an alien with the requisite criminal history, paragraph (2) expressly forbids DHS from releasing him.

2. Respondents have contended (Br. in Opp. 23-24) that interpreting "when the alien is released" to tell the Secretary when to arrest criminal aliens (but not to exempt them from mandatory detention) would render that phrase superfluous. Respondents have asked, "when else could the [Secretary] take an alien into custody except when he or she is released?" *Id.* at 23 (citation omitted). The answer is that the Secretary otherwise could potentially take the alien into immigration custody *before* he is released from criminal custody.

For aliens who are in federal criminal custody, Congress thereby ensured that they will serve their entire period of incarceration before DHS is obligated to take them into custody for removal proceedings. For aliens who are in state custody, Congress similarly made clear that the Secretary should not attempt to take them from a state jail or penitentiary, and instead should wait for the coordinate sovereign to release the alien from any term of imprisonment. Section 1226(c) thus embodies basic values of cooperation and comity between the federal government and the several States, allowing them to complete the basic punishment of a criminal alien for committing a state crime, before the federal government will take custody for removal proceedings. See also 8 U.S.C. 1231(a)(4)(A) (bar against actually removing "an alien who is sentenced to imprisonment until the alien is released from imprisonment"); 8 U.S.C. 1228(a)(3)(B) (similar bar for expedited removal of aliens convicted of aggravated felonies).

3. If Congress had intended to exempt criminal aliens from mandatory detention under Section 1226(c)

based on delay in arresting them, it easily could have done so—and it presumably would have answered the "nose-on-the-face obvious" question of how long a delay is too long. *Castañeda* v. *Souza*, 810 F.3d 15, 51 (1st Cir. 2015) (opinion of Kayatta, J.).

The natural place to add an exception to paragraph (2)'s detention mandate would have been in paragraph (2) itself. Paragraph (2) provides that DHS "may release" a covered criminal alien from detention "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). Congress could easily have added a second exception, saying, "or if the alien was not taken into custody immediately" or "promptly." Congress did not do so. Instead, its direction that DHS may release such a criminal alien "only if" the witness-protection exception is satisfied "expressly and unequivocally imposes an affirmative *prohibition* on releasing detained aliens under any other conditions." *Jennings*, 138 S. Ct. at 847.

In contrast, it would have been quite unusual to add an exception to paragraph (2) by changing the wording of paragraph (1). But Congress could have done that as well. Paragraph (2)'s prohibition against release applies to "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). Thus, for example, Congress might have provided, "The Secretary shall take into custody any alien who is removable because of his criminal history *and who has been released from criminal custody for no more than X amount of time*." That language would use the timing of custody as part of the description of the alien who is subject to the detention mandate ("any alien * * * who has been released from criminal custody for no more than X amount of time"). And in so doing, Congress would have adopted an express time limitation for

being subject to mandatory detention, which is effectively what respondents seek.[5] At the same time, however, that change to paragraph (1) would have introduced other problems, because it would also extinguish the Secretary's obligation to arrest the criminal alien in the first place if the Secretary were delayed.

But those problems aside, the language Congress actually enacted in paragraph (1) is strikingly different. First, the statute is missing the transition needed to make grammatical an additional description of the alien ("an alien who is removable because of his criminal history *and who* . . . "). Second, the subject of the distinct "when" clause is different. Rather than describing who is subject to mandatory custody, the language Congress actually enacted tells the Secretary when her duty to arrest "the alien" is triggered: "when the alien is released." 8 U.S.C. 1226(c)(1). Third, unlike the phrase "and who has been released from criminal custody for not more than X amount of time," the actual statute is missing something every statute-of-limitations-like provision must contain: It does not specify a limitations period. See, *e.g.*, 18 U.S.C. 3282(a) ("within five years"); 28 U.S.C. 2401(a) ("within six years"). That omission strongly suggests that Congress did not intend to exempt a criminal alien from mandatory detention if DHS

---

[5] To adopt the result respondents seek, Congress could not have simply provided: "The Secretary shall take into custody any alien who is removable because of his criminal history *and who is taken into immigration custody immediately upon his release from criminal custody*." Cf. Pet. App. 8a (*Preap* class definition). That would specify the time limit (immediate), but the mandate would be circular: The determination of who to arrest would depend on when that person was arrested. Adding a gap-in-custody exception to paragraph (1) thus would require additional statutory surgery.

is delayed, because Congress did not say how long a delay is too long—unless Congress intended the extremely unlikely result that *any* gap in custody, no matter how brief or justified, would confer the windfall of possible release on the criminal alien. Cf. *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015) ("That version of the argument has the virtue of resting on a general principle—but the vice of being implausible.").

As a result of that omission, the court of appeals' interpretation gives rise to grave line-drawing problems. See *Castañeda*, 810 F.3d at 51 (opinion of Kayatta, J.). Is anything slower than an instantaneous transfer too long? One minute? One hour? One day? One month? One year? Five years? If the deadline is not a bright-line time limit but a standard like "prompt" or "within a reasonable time," what does that mean and what factors are relevant? Would DHS get more time if it did not have the resources to send an agent to make the arrest at the time the alien was being released? What if DHS did not even know when the criminal alien was going to be released? "What if the state prison" or county jail "does not cooperate, making it impossible for federal agents to know when the alien will leave state custody?" *Ibid.* "What if the alien hides?" *Ibid.* What if the alien uses a fake identity or aliases? "What if the alien commits a new crime" that would not itself trigger mandatory detention? *Ibid.* Would it depend on the severity of the alien's underlying crimes? The statute provides no answers to any of these questions—nor does it even suggest how an agent in a DHS field office or an immigration judge would go about answering them. The natural inference is that Congress did not intend for a delay in custody to be relevant at all.

B. The BIA's Interpretation Advances Congress's Purpose Of Preventing Flight And Recidivism By Criminal Aliens

Section 1226(c)'s context and purpose further confirm that it mandates continued detention of all aliens with the requisite criminal history, regardless of whether DHS was delayed in arresting them.

1. Beginning in 1988, Congress began incrementally amending the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to constrain the Executive's discretion to release criminal aliens on bond. See *Demore* v. *Kim*, 538 U.S. 510, 520-521 (2003); pp. 30-35, *infra* (detailing history). Nonetheless, removable criminal aliens continued to reoffend and flee at alarming rates, giving rise to a "serious and growing threat to public safety." S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995) (Senate Report). One study showed that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Demore*, 538 U.S. at 518. And after release on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519; see *id.* at 520 (discussing subsequent study finding that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings"). Furthermore, the INS was slow in arresting and removing criminal aliens, with one study showing "that, at the then-current rate of deportation, it would take 23 years to remove every criminal alien already subject to deportation." *Id.* at 518.

In response to that "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens," Congress enacted Section 1226(c) in 1996. *Demore*,

538 U.S. at 518. Section 1226(c) embodies Congress's categorical judgment that aliens who are removable because they have the requisite criminal history pose an undue risk of flight and danger to the community—and that individual DHS officers and immigration judges should no longer be in the business of trying to predict which criminal aliens will actually flee or reoffend. See *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) ("[T]he animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens."), cert. denied, 138 S. Ct. 1547 (2018). Section 1226(c) eliminates those risks for covered criminal aliens by prohibiting their release. And in *Demore*, this Court held that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528.

"Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122; see *Demore*, 538 U.S. at 513 (discussing Congress's concerns about risks posed by "deportable criminal aliens who are not detained"); *e.g.*, Senate Report 2 ("nondetained criminal aliens"). In light of real-world experience with recidivism and flight by criminal aliens, Congress "eliminated all discretion" and mandated the detention of aliens with the requisite criminal history during their removal proceedings. *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 159 (3d Cir. 2013). Indeed, many provisions of the immigration laws are "aimed at expediting the removal of aliens, and that is especially true for criminal aliens such as those who fall within subparagraphs (A) through (D)." *Rojas*, 23 I. & N. Dec. at 121.

By contrast, the court of appeals' interpretation of Section 1226(c) would undermine Congress's basic purpose by exempting removable criminal aliens from mandatory detention, thereby re-enabling the very problems of flight and recidivism by "deportable criminal aliens who are not detained" that Congress enacted Section 1226(c) to prevent. *Demore*, 538 U.S. at 513. If a DHS officer or immigration judge were to release a criminal alien on bond, the alien would have the opportunity to flee (and thus evade removal) or to commit more crimes, which otherwise would have been prevented. Moreover, a rule that a criminal alien becomes exempt from mandatory detention if he is not taken into immigration custody within some period of time would create an added incentive for criminal aliens to flee or go into hiding the moment they are released from criminal custody, to avoid immigration custody for as long as possible and, if ever arrested, to gain the advantage of the possibility of release that otherwise would have been foreclosed.

To make matters worse, criminal aliens would become exempt from mandatory detention based on a factor—a gap in custody—that has nothing to do with the alien's criminal history, dangerousness, or flight risk. Indeed, a gap in custody "is irrelevant for all other immigration purposes." *Rojas*, 23 I. & N. Dec. at 122. None of the INA's provisions governing the initiation of removal proceedings or defining who is removable depends on whether there has been a gap in custody. See 8 U.S.C. 1182(a), 1225(b), 1227, 1228, 1229, 1229a. The existence or duration of a gap in custody is similarly irrelevant to any application for relief from removal. See *Rojas*, 23 I. & N. Dec. at 122. And the INA does not include a statute of limitations for initiating removal

proceedings against a criminal alien—much less a provision exempting criminal aliens from removal proceedings if those proceedings are not initiated within some period of time following the alien's release from criminal custody. *E.g.*, *Adams* v. *Holder*, 692 F.3d 91, 106 (2d Cir. 2012) ("[T]he INA places no time limits on the Attorney General's power to initiate removal proceedings against any alien.").[6] It is thus highly unlikely that Congress buried in the "when the alien is released" clause of paragraph (1) a novel and counterproductive rule that a criminal alien becomes exempt from mandatory detention if he happens not to be arrested by immigration authorities for some period of time after release from criminal custody—and all the more so if he is not arrested immediately.

C. The BIA's Interpretation Avoids Serious Practical Problems

"[T]he BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute." *Lora* v. *Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018). "As the BIA explained in *Rojas*, '[i]t is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release.'" *Ibid.* (quoting *Rojas*, 23 I. &. N. Dec. at 128) (brackets in original). "Particularly for criminal aliens in state custody," the Second Circuit has

---

[6] The INA imposes a five-year limitations period for administrative rescission of adjustment of status to that of a lawful permanent resident, 8 U.S.C. 1256(a), but a gap in custody is irrelevant under that provision as well.

explained, "it is unrealistic to assume that DHS will be aware of the exact timing of an alien's release from custody, nor does it have the resources to appear at every location where a qualifying alien is being released." *Id.* at 612-613; see Senate Report 2 (discussing how resource constraints hampered the INS's enforcement efforts against criminal aliens).

Indeed, gaps in custody are often caused by reasons outside the federal government's control. To facilitate its efforts to take criminal aliens into custody, U.S. Immigration and Customs Enforcement (ICE) often sends requests to state or local jurisdictions known as "detainers": ICE requests the jurisdiction to notify it in advance when a particular criminal alien is to be released from custody, and to hold the alien in custody for up to 48 hours thereafter to enable ICE officers to effectuate the arrest in an orderly manner. See 8 C.F.R. 287.7(a) and (d). State and local jurisdictions do not always cooperate with those requests, however. For example, ICE reported for fiscal year 2016 that its enforcement and removal officers "documented a total of 21,205 declined detainers in 567 counties in 48 states including the District of Columbia between January 1, 2014, and September 30, 2016." ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report* 9 (*2016 Report*); see ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* 9 (reporting 19,162 declined detainers in fiscal years 2015 through 2017). "Declined detainers result in convicted criminals being released back into U.S. communities," ICE has explained, thus creating gaps in custody "notwithstanding ICE's requests for transfer of those individuals." *2016 Report* 9. The court of appeals' interpretation would thus frustrate DHS's ability to remove inadmissible and deportable

criminal aliens from the United States, in contravention of Congress's basic purpose.

It is also particularly unlikely that Congress made the success of its mandatory-detention regime dependent upon obtaining perfect cooperation from States and localities. The detention here is an integral part of the federal government's program to remove criminal aliens from the United States, which is a process "entrusted to the discretion of the Federal Government." *Arizona* v. *United States*, 567 U.S. 387, 409 (2012). It would thus be unusual to give an alien greater rights in those federal proceedings (the right to a bond hearing and possible release) if a State or locality had been *less* cooperative before those proceedings began.

Moreover, at the time Congress enacted Section 1226(c), imperfect cooperation was already an issue. Some jurisdictions had "enacted laws, often referred to as refuge, sanctuary or non-cooperation laws, that prohibit or limit local government employees' cooperation with the INS." Senate Report 28; see *id.* at 28-30. There is no hint that Congress viewed a lack of state or local cooperation as a potential basis for conferring on a removable criminal alien the windfall of an opportunity for release from immigration detention. Rather, the Senate Report explained that such laws made "effective governmental response to the problem of criminal aliens substantially more difficult." *Id.* at 30.

D. This Court's Decisions Further Confirm That The BIA's Decision Is Correct

This Court's precedents further support the BIA's conclusion that mandatory detention under Section 1226(c) is not limited to criminal aliens who were taken into custody immediately. This Court has repeatedly held that statutes providing that "the Government

'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003); see *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."); *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986) (stating that the Court "would be most reluctant to conclude that every failure of an agency to observe" a deadline "voids subsequent agency action, especially when important public rights are at stake").

For example, the Court held in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), that "a provision that a detention hearing 'shall be held immediately upon the [detainee's] first appearance before the judicial officer' did not bar detention after a tardy hearing." *Barnhart*, 537 U.S. at 159 (quoting *Montalvo-Murillo*, 495 U.S. at 714) (brackets in original). Otherwise, "every time some deviation from the strictures" of the statute were to occur, the Court explained, it would "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Montalvo-Murillo*, 495 U.S. at 720.

Those same considerations strongly support the BIA's interpretation of Section 1226(c). Exempting criminal aliens from mandatory custody if the government is delayed arresting them "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous

criminals." *Sylvain*, 714 F.3d at 160-161; see *Lora*, 804 F.3d at 612; *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1326 (10th Cir. 2015); *Hosh*, 680 F.3d at 381-383.

In breaking from its sister circuits, the Ninth Circuit described *Montalvo-Murillo* and *Barnhart* as a "'loss-of-authority' line of cases," Pet. App. 23a, and distinguished Section 1226(c) on the ground that DHS would not lose its authority to detain the criminal aliens here. The Ninth Circuit reasoned that DHS could still detain those aliens under 8 U.S.C. 1226(a), so long as it provided a bond hearing and the alien was denied bond or failed to post bond. See Pet. App. 23a-27a. But that reasoning misses the very purpose of Section 1226(c). Under the Ninth Circuit's decision, DHS *does* lose its authority—indeed, obligation—to execute Congress's directive for *mandatory* detention of criminal aliens.

The Ninth Circuit's reasoning also misapprehends the rationale of this Court's precedents. Those decisions reflect the common-sense point that important action is better late than never. When Congress has concluded that an objective is so important that it has affirmatively directed the government to act in some amount of time to accomplish it, then this Court will assume (absent a demonstration to the contrary) that if the government acts after that time, the public will not lose the benefit of that action. See *Barnhart*, 537 U.S. at 159 ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.") (citation omitted); *Sylvain*, 714 F.3d at 158 ("Bureaucratic inaction—whether the result of inertia, oversight, or design—should not rob the public of statutory benefits").

In *Montalvo-Murillo*, Congress enacted the relevant provision to protect the public by providing for detention itself. See 495 U.S. at 719-721. Here, Congress enacted Section 1226(c) to protect the public by providing for *mandatory* detention, *i.e.*, by mandating the arrest and prohibiting the release of criminal aliens during removal proceedings and thereby adding assurance that they will not flee or commit further crimes. But in both cases, if the government is tardy, there is no basis for the consequence that the Ninth Circuit imposed: Depriving the public of the protection for which Congress required action in the first place.

It is thus no answer to suggest that, if the government is late in arresting a removable criminal alien, the alien becomes exempt from mandatory custody but the government would still have authority to continue detaining him if it gives him a bond hearing and he is denied bond. The whole point of Section 1226(c)(2) is to benefit the public by *eliminating* release of detained criminal aliens by immigration officers or immigration judges, and thereby eliminating the possibility that they will release a criminal alien who will thereafter flee or commit further crimes. See *Demore*, 538 U.S. at 513, 520. Any delay by the government therefore should not deprive the public of the very protection Congress sought to provide.

E. Section 1226(c)'s History Shows That Congress Intended To Prohibit Release Of All Aliens With The Requisite Criminal History

The historical backdrop against which Congress enacted Section 1226(c) further confirms that the BIA's interpretation of the statute is correct. Indeed, Congress has repeatedly ratified the Executive's longstand-

ing view that the general prohibition against release applies to any alien with the requisite criminal history, regardless of any gap in custody.

1. Congress first mandated detention of criminal aliens during removal proceedings in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470 (8 U.S.C. 1252(a)(2)). That provision consisted of two sentences that are similar to the two sentences in Section 1226(c). See *Rojas*, 23 I. & N. Dec. at 122-123. The first sentence directed that the Attorney General "shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." 8 U.S.C. 1252(a)(2) (1988). The second contained a general prohibition against release, providing that "the Attorney General shall not release such felon from custody." *Ibid.*

To the extent it was ambiguous whether "such felon" meant "any alien convicted of an aggravated felony" (or only such felons who were actually arrested by immigration authorities immediately "upon completion of the alien's sentence"), 8 U.S.C. 1252(a)(2) (1988), the INS resolved the ambiguity by adopting the former interpretation. The INS promulgated regulations directed at immigration officers, providing that "in the case of a respondent convicted * * * of an aggravated felony," the alien "*shall not be released from custody* unless" a removal order had already been entered and certain criteria were satisfied. 55 Fed. Reg. 24,858, 24,859 (June 19, 1990) (8 C.F.R. 242.2(c)(1)) (emphasis added).[7] The regulations thus flatly prohibited the release on bond of any alien with the requisite criminal history.

---

[7] Detention after the entry of a final order of removal is now governed by a separate statute, 8 U.S.C. 1231. See *Zadvydas* v. *Davis*, 533 U.S. 678, 698 (2001).

2. Congress returned to the subject of mandatory detention of criminal aliens in 1990 and 1991. See Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 5049 (Nov. 29, 1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751. As amended, the INA retained the mandate to arrest any alien convicted of an aggravated felony, and retained the general prohibition against releasing "such felon" from custody. 8 U.S.C. 1252(a)(2) (1988 & Supp. IV 1992). But Congress added an express exception that allowed the release of "any lawfully admitted alien who has been convicted of an aggravated felony," so long as he demonstrated that he was not a flight risk or a danger. *Ibid.*[8]

Those amendments confirm that there was no gap-in-custody exception. First, the fact that the new statutory exception reached "any lawfully admitted alien" with the requisite criminal history—regardless of when he was taken into immigration custody—indicates that the general prohibition against releasing "such felon" similarly did not depend on when the criminal alien was taken into immigration custody. See *Rojas*, 23 I. & N. Dec. at 123. Otherwise, the exception would be broader than the general rule. *Ibid.*

Second, Congress amended the statute against the backdrop of INS regulations that interpreted the prohibition against releasing "such felon" to bar release of any detained alien with the requisite criminal history. See 55 Fed. Reg. at 24,859. Yet Congress did not alter

---

[8] Those amendments also clarified that the government's duty to arrest a criminal alien was triggered when the alien was released on parole. See 8 U.S.C. 1252(a)(2)(A) (1988 & Supp. IV 1992) (shall arrest "upon release of the alien (regardless of whether or not such release is on parole")). Section 1226(c) contains similar language.

the general prohibition against releasing "such felon." The choice to leave that language unchanged provides "convincing support for the conclusion that Congress accepted and ratified" the INS's understanding that "such felon" referred to any alien with the requisite criminal history. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015); see *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 244 n.11 (2009). The Executive Office for Immigration Review (EOIR) thereafter issued regulations addressed to immigration judges, again interpreting the general prohibition against release to encompass any detained alien with the requisite criminal history. See 57 Fed. Reg. 11,568, 11,572 (Apr. 6, 1992) (8 C.F.R. 3.19(h)) ("An alien in deportation proceedings who has been convicted of an aggravated felony *shall not be released from custody on bond*," except under the new exception for lawfully admitted aliens) (emphasis added).

3. In 1996, Congress amended the statute twice against the foregoing cumulative backdrop, ratifying the government's position twice more. First, it eliminated the exception for lawfully admitted aliens. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1277. Second, Congress adopted the current mandatory-detention provision, Section 1226(c). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-585. In so doing, Congress expanded the reach of mandatory detention to aliens convicted of other serious crimes (in addition to aggravated felonies) or who had engaged in terrorist activities, see 8 U.S.C. 1226(c)(1), and added a

narrow exception allowing release "only" for witness-protection purposes, 8 U.S.C. 1226(c)(2).[9]

Notably, however, Congress once again made no material change to the general prohibition against release. The first sentence now directs that the Secretary "shall take into custody any alien" who has the requisite criminal history, "when the alien is released." 8 U.S.C. 1226(c)(1). And the second sentence now prohibits the release of "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). But there is no material difference between that language and its predecessors.

First, the only apparent difference between the new phrase "an alien described in paragraph (1)" and its predecessor ("such felon") is that the phrase "an alien described in paragraph (1)" is broader, because Congress mandated detention of some criminal aliens who are not aggravated felons or indeed felons at all. Under either version, however, the second sentence equally prohibits the government from releasing from immigration custody any alien who has the requisite criminal history.

Second, the new clause "when the alien is released" and its predecessor ("upon release of the alien") both tell the Secretary when to arrest the alien, and presuppose that the Secretary already knows who "the alien" is. And if anything, "when the alien is released" is *less*

---

[9] There is legislative history documenting Congress's decision to create a witness-protection exception. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 230 (1995). But there is no mention of exempting criminal aliens from mandatory detention based on a gap in custody. Congress also enacted transitional rules to govern the interim period before Section 1226(c) went into effect. See IIRIRA § 303(b)(3), 110 Stat. 3009-586. The transitional rules similarly prohibited the release of any alien with the requisite criminal history, without regard to any gap in custody. See *ibid.*

susceptible to respondents' construction than "upon release of the alien." The word "upon" means "immediately following on; very soon after." *Webster's* 2518. But "when" can also mean "at or during the time that" ("while"). *Id.* at 2602; pp. 17-18, *supra*. It is thus consistent with the text of the current statute to say that each named respondent here, for example, was taken into custody "when the alien [wa]s released," 8 U.S.C. 1226(c)(1), because each was taken into custody "during the time that" or "while" he was free from criminal custody. In any event, the adverbial timing clause is irrelevant to the detention mandate in paragraph (2).

Section 1226(c) is thus the result of a repeated dialogue between Congress and the Executive, where (1) Congress prohibited the release of aliens from detention if they had the requisite criminal history; (2) the Executive issued regulations interpreting that general prohibition to apply to any alien with that criminal history, regardless of any gap in custody; (3) Congress then amended the statute, but without making any material change to the general prohibition against release; and (4) the cycle repeated, with the Executive issuing new regulations saying the same thing and Congress once again amending the statute without material change. This repeated cycle of congressional ratification strongly supports the BIA's interpretation of the statute: Removable criminal aliens do not become exempt from mandatory detention if the government is delayed in arresting them.

F. The Court Of Appeals' Counterarguments Lack Merit

1. In reaching a contrary result, the court of appeals reasoned (Pet. App. 16a) that the BIA's interpretation improperly "de-links the 'Custody' directive in § 1226(c)(1) from the bar to 'Release' in (c)(2)." The

court believed that if DHS did not arrest a criminal alien "promptly," *id.* at 6a, then any later arrest of the alien must have been pursuant to Section 1226(a), and that it would be inconsistent with the structure of the statute for Section 1226(c)(2) to prohibit the release of an alien who had been arrested under Section 1226(a).

That analysis is doubly flawed. First, as set forth above, see pp. 27-30, *supra*, the premise is incorrect. Regardless of whether DHS arrests a covered criminal alien promptly, it still arrests him as required by Section 1226(c): DHS is fulfilling its duty under Section 1226(c)(1) to "take into custody any alien who" is removable because the alien has the requisite criminal history. 8 U.S.C. 1226(c)(1). And paragraph (2) still prohibits DHS from releasing that alien, because he is still "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). Accordingly, under the government's interpretation, the two paragraphs work "hand in hand." Pet. App. 15a.

Second, the court of appeals' structural argument is misplaced. Paragraph (2)'s prohibition against release does not depend on whether the government arrested the criminal alien immediately upon his release from criminal custody (or promptly thereafter). Rather, it prohibits the release of any "alien described in paragraph (1)," and the clause "when the alien is released" does not describe the alien; it tells the government when to arrest "the alien" who has already been described. See pp. 13-21, *supra*. Accordingly, it would not matter if the government were thought to have arrested such an alien on authority in Section 1226(a). He would still be an "alien described in paragraph (1)" of Section 1226(c), and paragraph (2) would prohibit his release.

That understanding also fully meshes with the text of Section 1226(a). The first sentence of Section 1226(a)

provides that, on a warrant issued by the Secretary, an alien "may be arrested and detained" pending a decision on his removal. 8 U.S.C. 1226(a). The second sentence of Section 1226(a) then addresses continued detention or release of the alien. It provides that, "*[e]xcept as provided in subsection (c)*," the Secretary "may continue to detain the arrested alien" or "may release" the alien on bond. *Ibid.* (emphasis added). Thus, by the plain terms of Section 1226(a), if a criminal alien is arrested under the authority of the first sentence of Section 1226(a), his continued detention is still governed by Section 1226(c)(2) and its prohibition against release.

2. The court of appeals also asserted (Pet. App. 22a) that Congress's aims of preventing flight risk and dangerousness "are ill-served when the critical link between criminal detention and immigration detention is broken and the alien is set free for long stretches of time." That reasoning too is doubly flawed. In the first place, the injunctions here exempt criminal aliens from mandatory detention if they are not arrested "immediately." *Id.* at 8a, 59a. And the court of appeals affirmed those injunctions on the basis of its conclusion that the arrest must occur "promptly." *Id.* at 6a, 59a. There is no sound basis for concluding that every criminal alien's risk of fleeing or reoffending is categorically lower whenever there has been any gap in custody or the arrest has not been "prompt."

More fundamentally, however, Congress was not concerned about a link between "*criminal detention*" and "immigration detention." Pet. App. 22a (emphasis added). Congress was concerned about the link between an alien's *criminal history* and an increased likelihood that he would later flee or reoffend. See *Rojas*, 23 I. & N. Dec. at 122; Senate Report 2 (discussing risks

posed by "nondetained criminal aliens"). And a gap in custody does not undo an alien's criminal history.

The court of appeals further hypothesized (Pet. App. 22a-23a) that, "without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justified mandatory detention are still present." But Congress made a determination that detention should be mandatory for any alien with the requisite criminal history, regardless of any other factors. And it is not "impossible to conclude" that there is a sufficient causal link between an alien's criminal history and the probability he will flee or commit more crimes if released on bond. This Court concluded that "[t]he evidence Congress had before it" of that causal link "certainly supports the approach it selected." *Demore*, 538 U.S. at 528.

There is no hint in the text, structure, history, or purpose of Section 1226(c) that Congress wanted immigration judges to consider individually a criminal alien's conduct after release from criminal custody. That is especially so because Congress unambiguously prevented the individualized consideration of a criminal alien's conduct—other than his criminal history—during any other span of time. Congress thus prohibited consideration of an alien's conduct during "any intervening period of freedom" (Pet. App. 22a) between when the alien committed the underlying crime and when he was arrested for it, or while he was released on bond during the pendency of those criminal charges; his conduct during his incarceration; or even his conduct before the underlying crime. Respondents have provided no basis for concluding that Congress intended the alien's conduct after his release from criminal custody to be the

unique exception to Congress's categorical approach that is mandated by Section 1226(c).

II. The BIA's Correct Interpretation Of The Statutory Scheme It Administers Warrants Deference

For the reasons set forth above, by far the best interpretation of Section 1226(c) is that it does not exempt criminal aliens from mandatory detention if DHS does not arrest them immediately. At a minimum, the BIA reasonably interpreted Section 1226(c), and that decision warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

"Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment) (deferring to BIA under *Chevron*); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Those holdings reflect the INA's statutory direction that the Attorney General is charged with the administration of removal proceedings, and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)); see 8 U.S.C. 1103(g); p. 2 n.1, *supra*. Because the Attorney General has vested his adjudicative and interpretive authority in the BIA (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference." *Aguirre-Aguirre*, 526 U.S. at 425.

Here, in a precedential en banc decision, the BIA adopted by far the best interpretation of the key statutory phrase, an "alien described in paragraph (1)." See *Rojas*, 23 I. & N. Dec. at 125. After thorough analysis,

the BIA concluded that that phrase is properly understood to refer to the clause in paragraph (1) that describes the alien on the basis of the criminal history that makes him subject to mandatory detention, and not to encompass the distinct "when the alien is released" clause. *Id.* at 117-127. The court explained that its reading was supported by "the statutory language," "the object and design of the statute as a whole," and "the history of the mandatory detention provisions," and was "reinforced by practical concerns that would otherwise arise." *Id.* at 125; see *id.* at 117-125. That decision is at the very least reasonable and warrants deference.

The court of appeals refused to defer to the BIA's interpretation because the court concluded (Pet. App. 19a) that Section 1226(c) "unambiguously" rewards criminal aliens with the opportunity for release if DHS does not arrest them promptly. But it is far from clear, to say the least, that Congress adopted such a rule, and indeed the word "promptly" does not appear in the statute. See *Lora*, 804 F.3d at 611 ("[W]e have little trouble concluding that [the statute] is ambiguous."); *Olmos*, 780 F.3d at 1322 ("Even with the statutory text, clues, and canons, a reader cannot tell from the text alone whether aliens remain subject to mandatory detention after a gap in custody."); *Hosh*, 680 F.3d at 378 ("§ 1226(c) may arguably be susceptible to more than one interpretation," but the BIA's interpretation "is a permissible, and more plausible, construction.").

If anything, for the reasons set forth above, the statute unambiguously forecloses the court of appeals' interpretation, when the statutory language is read in light of its structure, context, purpose, and history, and this Court's precedents. See *Sylvain*, 714 F.3d at 157 (declining to decide whether *Chevron* applies because

"nothing in the statute suggests that immigration officials lose authority if they delay"). Section 1226(c)(2) prohibits the release of any alien described in paragraph (1), and paragraph (1) describes criminal aliens on the basis of their criminal history—not by how long they were released before DHS arrested them. In adopting Section 1226(c), Congress ratified the Executive's preexisting view that detention was mandatory, without regard to a gap in custody. And as this Court's precedents establish, it would be improper for a court to impose the consequence of exempting a criminal alien from mandatory detention for any delay by the government. That result would contravene Congress's fundamental purpose in mandating arrest and detention of criminal aliens in the first place, by exposing the public to the very dangers of flight and recidivism that Congress enacted Section 1226(c) to prevent.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ZACHARY D. TRIPP
Assistant to the Solicitor General
TROY D. LIGGETT
Attorney

JUNE 2018

No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

—v.—

MONY PREAP, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue
Seattle, WA 98104-2244

Robert Pauw
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98103

Devin T. Theriot-Orr
SUNBIRD LAW, PLLC
1001 4th Avenue, Suite 3200
Seattle, WA 98154

Counsel for Khoury Respondents

Michael K.T. Tan
Counsel of Record
Cecillia Wang
Judy Rabinovitz
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
mtan@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Lucas Guttentag
559 Nathan Abbott Way,
Stanford, CA 94305

Counsel for Preap and Khoury Respondents

(*Counsel continued on inside cover*)

Emily Chiang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
OF WASHINGTON
901 5th Avenue, Suite 630
Seattle, WA 98164

Counsel for Khoury Respondents

Vasudha Talla
AMERICAN CIVIL LIBERTIES
FOUNDATION OF NORTHERN
CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Anoop Prasad
Jingni (Jenny) Zhao
ASIAN AMERICANS ADVANCING
JUSTICE–ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, CA 94111

Daniel Purcell
Grace Y. Yang
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111

Counsel for Preap Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. THE TEXT AND STRUCTURE OF SECTION 1226(c) COMMAND DHS TO APPLY MANDATORY DETENTION "WHEN THE ALIEN IS RELEASED" FROM CRIMINAL CUSTODY, NOT AT WHATEVER TIME THE AGENCY DECIDES AFTER RELEASE 15

A. The Text Imposes Mandatory Detention Only on Noncitizens Detained "When . . . Released" From Criminal Custody 15

B. The Government's Contrary Reading Turns a Specific Mandate into a General Invitation, and Cannot Be Squared With the Statute's Text and Structure. ... 20

i. An Alien Described in Paragraph (1)" Means All of Paragraph (1). 21

ii. When the Alien Is Released" Does Not Mean "While" or "After" She Is Released. 25

II. THE COURT OF APPEALS' INTERPRETATION ACCORDS WITH CONGRESS'S PURPOSE OF REQUIRING THE SECRETARY TO ENSURE AN IMMEDIATE TRANSFER OF NONCITIZENS FROM CRIMINAL TO IMMIGRATION CUSTODY. 29

A. The Legislative History Shows That Congress's Purpose Was to Ensure the Immediate Transfer to Immigration Custody of Noncitizens When Released from Criminal Custody. 30

B. The Government's Legislative History Arguments Lack Merit. 34

III. CONSTITUTIONAL AVOIDANCE REQUIRES READING SECTION 1226(c) NARROWLY. 37

IV. THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT. 43

A. *Chevron* Deference Does Not Apply to the BIA's Interpretation of Section 1226(c). 43

B. The Government's Arguments Regarding State and Local Compliance with Detainer Requests Are Unavailing. 46

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c). 48

CONCLUSION 52

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 50

Boumediene v. Bush, 553 U.S. 723 (2008) 44

Brock v. *Pierce Cnty.*, 476 U.S. 253 (1986)..... 49

Burrage v. United States, 571 U.S. 204 (2014)..... 28

Castañeda v. Souza, 769 F.3d 32 (1st Cir. 2014)..... 41

Castañeda v. Souza,
810 F.3d 15 (1st Cir. 2015).....*passim*

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) .....*passim*

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995) 19

Clark v. Martinez, 543 U.S. 371 (2005)..... 42

Comm'r of Internal Revenue v. Clark,
489 U.S. 726 (1989) 19

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 20

Crowell v. Benson, 285 U.S. 22 (1932) 38

Deal v. United States, 508 U.S. 129 (1993)..... 26

Demore v. Kim, 538 U.S. 510 (2003) .....*passim*

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,
485 U.S. 568 (1988) 42, 44

Foucha v. Louisiana, 504 U.S. 71 (1992) 39

General Dynamics Land Systems v. Cline,
540 U.S. 581 (2004) 26

Gordon v. Napolitano,
No. 3:13-cv-30146-PBS (D. Mass.) 28, 41

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 45

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 45

INS v. Cardozo-Fonseca, 480 U.S. 421 (1987) 19

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 16, 19, 38

Judulang v. Holder, 565 U.S. 42 (2011) 43, 46

Kansas v. Hendricks, 521 U.S. 346 (1997) 39

Khodr v. Adduci, 697 F. Supp.
2d 774 (E.D. Mich. 2010) 22

Matter of Eden, 20 I. & N. Dec. 209 (BIA 1990) 31

Matter of Garcia-Arreola,
25 I. & N. Dec. 267 (BIA 2010) 6

Matter of Garvin-Noble,
21 I. & N. Dec. 672 (BIA 1997) 33

Matter of Guerra,
24 I. & N. Dec. 37 (BIA 2006) 3, 16, 49

Matter of Rojas,
23 I. & N. Dec. 117 (BIA 2001) ..... *passim*

Matter of Urena, 25 I. & N. Dec. 140 (BIA 2009) 49

Matter of West, 22 I. & N. Dec. 1405 (BIA 2000) 6

Nken v. Holder, 556 U.S. 418 (2009) 19

Pereira v. Sessions, 138 S. Ct. 2105 (2018) ..... *passim*

Regions Hosp. v. Shalala, 522 U.S. 448 (1998) 49

Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009) ...*passim*

Schall v. Martin, 467 U.S. 253 (1984) 39

SEC v. Chenery Corp., 332 U.S. 194 (1947) 25, 27

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 44

Sylvain v. Attorney Gen. of the United States, 714 F.3d 150 (3d Cir. 2013) 18

TRW Inc., v. Andrews, 534 U.S. 19 (2001) 21

United States v. Calamaro, 354 U.S. 351 (1957) 34, 35

United States v. Montalvo-Murillo, 495 U.S. 711 (1990) 49

United States v. Salerno, 481 U.S. 739 (1987) 39

United States v. Willings, 8 U.S. 48 (1807) 26

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 36

Zadvydas v. Davis, 533 U.S. 678 (2001) 38, 39, 45

STATUTES

6 U.S.C. § 202(3) 4

6 U.S.C. § 251 4

6 U.S.C. § 271(b) 4

6 U.S.C. § 542 4

6 U.S.C. § 557 4

Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181 (8 U.S.C. § 1252(a)(2) ..... *passim*

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 ..... 31, 36, 37

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ..... *passim*

Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 ..... 31, 35

8 U.S.C. § 1103(a) 4

8 U.S.C. § 1103(g) 4

8 U.S.C. § 1182(a) 4, 24

8 U.S.C. § 1226(a) ..... *passim*

8 U.S.C. § 1226a(a) 8

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1228 48

8 U.S.C. § 1229b(a)-(b) 42

8 U.S.C. § 1231(a) 19, 22

8 U.S.C. § 1357(g) 48

8 U.S.C. § 1537 8

LEGISLATIVE MATERIALS

Grassley Amendment 53 to S. 744, 113th Cong. (2013) 32

H.R. 1901, 113th Cong. § 2(b)(3) (2013) 32

H.R. 1932, 112th Cong. § 2(b)(5) (2011) 32

H.R. 3003, 115th Cong. § 4(a)(3) (2017) 32

H.R. Rep. 112-255 (Oct. 18, 2011) 32

H.R. Rep. No. 101-681(I) (1990) 31
House Conf. Rep. 104-828 (1996) 31
S. Rep. No. 104-48 (1995) 37

REGULATIONS

8 C.F.R. § 242.2(c)(1) 34
8 C.F.R. § 1003(h) 35
8 C.F.R. § 1003.19(a) 3, 16
8 C.F.R. § 1236.1(c)(8) 16
8 C.F.R. § 1236.1(d) 3, 15
55 Fed. Reg. 24,858 (June 19, 1990) 34
55 Fed. Reg. 43,326 (Oct. 29, 1990) 34
57 Fed. Reg. 11,568 (Apr. 6, 1992) 35

OTHER AUTHORITIES

Adriana Lafaille & Anant Saraswat, *Supreme Court Case has Echoes in Massachusetts*, https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts (last visited Aug. 5, 2018) 28

Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L. Rev 143 (2015) 45

ICE, Criminal Alien Program, https://www.ice.gov/ criminal-alien-program (last visited Aug. 5, 2018) 47

ICE, *Fiscal Year 2017 Enforcement and Removal Operations Report* (Dec. 13, 2017) 47

Immigrant Legal Resource Ctr., *The Rise of Sanctuary* (Jan. 2018) 47

Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153 (2004) 45

Webster's Third New Int'l Dictionary (2002)..... 18

INTRODUCTION

The mandatory immigration detention statute, 8 U.S.C. § 1226(c), directs that the Secretary of Homeland Security "shall take into custody" a noncitizen removable on one of four enumerated grounds "when the alien is released" from criminal custody. *Id.* § 1226(c)(1). Such a person may then be released only if necessary for witness protection. *Id.* § 1226(c)(2).

The court of appeals interpreted this statute to impose mandatory detention, without any custody hearing to assess flight risk or danger, only when the Secretary promptly detains an individual upon his release from criminal custody. In other circumstances, as in class member Eduardo Vega Padilla's case where Immigration and Customs Enforcement ("ICE") agents arrested him 11 years after release from a brief jail term, the government retains authority to detain, but is governed by the ordinary detention regime in 8 U.S.C. § 1226(a). Under that statute, the individual remains detained unless he is able to prove to an immigration judge that he does not pose a flight risk or a danger to the community.

Congress designed Section 1226(c)'s structure and unambiguous textual directive to detain "when the alien is released" to instruct the Secretary to eliminate gaps in custody between the criminal and immigration systems. The court of appeals' interpretation faithfully furthers Congress's purpose by enforcing the statute's literal terms to require the Secretary to detain promptly "when the alien is released" from criminal custody.

The government's contrary interpretation turns the plain language, structure, and congressional purpose upside down. On its reading, the Secretary need not detain an individual promptly "when . . . released," but instead may elect to do so at any time after release. This transforms Congress's mandate that the Secretary shall detain specified individuals immediately into an open-ended option to detain them at some indefinite point in the future.

The doctrine of constitutional avoidance further supports the court of appeals' ruling, because the government's interpretation raises serious constitutional problems. Civil detention generally may be imposed only when it is not arbitrary or punitive and subject to an individualized process to ensure that it is justified. This Court has previously upheld Section 1226(c) as a "narrow" exception to the general requirement of an individualized custody hearing, but only as to an individual who conceded that the statute applied to him and was detained within a day of his release. *Demore v. Kim*, 538 U.S. 510, 513-14, 526 (2003). Imposing an irrebuttable categorical presumption of flight risk and danger "when the alien is released" is not justified once an individual has been at liberty for years in the community.

Under the government's reading, a statute whose plain terms require an immediate transition from criminal to immigration custody instead would permit delays in the imposition of mandatory detention on individuals who have long been at liberty and pose no risk whatsoever.

STATEMENT OF THE CASE

I. Legal Framework

Section 1226 governs the detention of noncitizens during removal proceedings and affords the government substantial detention authority in every case.

Section 1226(a) sets forth the government's general detention authority, providing that immigration officials may detain any individual pending a decision on her removal. It states that, "*[e]xcept as provided in subsection (c),*" immigration officials "may continue to detain" the individual or "may release" the individual on bond or conditional parole. 8 U.S.C. § 1226(a) (emphasis added). If the government detains a noncitizen under Section 1226(a), the noncitizen may seek review of the decision by an immigration judge at a custody hearing. *See* 8 C.F.R. §§ 1003.19(a), 1236.1(d) (2018); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). At such a hearing, the government enjoys a presumption in favor of detention, and the noncitizen bears the burden of proving she is neither a danger to the community nor a flight risk in order to secure release. *Id.* at 40.

Section 1226(c), the exception referenced in Section 1226(a), requires mandatory detention without an individualized hearing. It is a narrow exception, applying only to persons who are removable on certain enumerated grounds *and* who are detained by the immigration authorities "when . . . released" from criminal custody. Section 1226(c)(1) provides:

> (1) Custody
>
> The [Secretary of Homeland Security][1] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphasis added).

---

[1] Although the statute refers to the "Attorney General," Congress has transferred the enforcement of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. §§ 1103(a)(1) & (g).

Section 1226(c)(2), in turn, authorizes release of "an alien described in paragraph (1) only if . . . necessary" for the limited purposes of the federal witness protection program:

> (2) Release
>
> The [Secretary of Homeland Security] may release an alien described in paragraph (1) only if the [Secretary] decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c)(2).

The two subsections of Section 1226(c) together establish the parameters of the mandatory detention regime. The statute requires the Secretary to detain individuals who are removable on enumerated grounds "when [they are] released" from criminal custody, and then authorizes release of

individuals "described in paragraph (1)" only if necessary for witness protection. In all other circumstances not described in Section 1226(c), the general detention rule set forth in Section 1226(a) applies, and an immigration judge may conduct an individualized custody hearing where the detainee bears the burden of proof.

The Board of Immigration Appeals ("BIA") and the Department of Homeland Security ("DHS") have interpreted Section 1226(c) to require the mandatory detention of noncitizens who: (1) are removable on a ground enumerated in subsections (1)(A)-(D); (2) have been in physical criminal custody for the offense that subjects them to the enumerated ground of removal; and (3) have been released from physical criminal custody for that offense. *See Matter of Garcia-Arreola*, 25 I. & N. Dec. 267, 270-71 (BIA 2010); *Matter of West*, 22 I. & N. Dec. 1405, 1410 (BIA 2000).

In *Matter of Rojas*, the BIA further held that the "when . . . released" language "direct[s] [the Secretary] to take custody of aliens immediately upon their release from criminal confinement," and that the respondent in that case—who was not taken into custody until two days after his release—was not detained "immediately." 23 I. & N. Dec. 117, 118, 119, 122 (BIA 2001). However, the BIA determined that Section 1226(c)(2) alone defines the scope of mandatory detention and that the provision is ambiguous as to whether it encompasses the "when . . . released" clause. *Id.* at 119-20. The BIA then read Section 1226(c)(2)'s reference to an "alien described under paragraph (1)" not to refer back to all of paragraph (1), but only to a portion, namely

subparagraphs (1)(A)-(D). *Id.* at 121. Accordingly, the BIA deemed immaterial the fact that the government had failed to detain Mr. Rojas "when . . . released," and affirmed that he was subject to mandatory detention. *Id.* at 127. Seven BIA members dissented from the decision, concluding that Congress intended for mandatory detention to apply only to individuals when they are released from criminal custody, and not after they have been living at large in the community. *See id.* at 139 (Rosenberg, dissenting).

II. Factual Background

This case concerns two decisions by the Ninth Circuit, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), and *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (unpublished memorandum disposition). Pet. App. 1a, 58a. In each case, the plaintiffs filed a class action complaint and habeas petition on behalf of themselves and similarly situated individuals.

The lead plaintiffs in these cases, Mony Preap and Bassam Yusuf Khoury, are lawful permanent residents whom the government charged with removal for a criminal offense enumerated under Section 1226(c). Plaintiffs served their criminal sentences and, upon release, returned to their families and communities. Years later, the immigration authorities took them into custody and detained them without bond hearings under Section 1226(c). Plaintiffs challenge the government's application of Section 1226(c) to individuals who

were not detained "when . . . released" from criminal custody. *See* Pet. App. 6a, 58a-59a, 110a-111a.[2]

The record reveals that there was no justification for application of an irrebuttable presumption of flight risk or dangerousness to the plaintiff class. For example, Eduardo Vega Padilla, a named plaintiff in *Preap*, has been a lawful permanent resident since he came to the United States as a toddler in 1966. He has five U.S.-citizen children and six U.S.-citizen grandchildren. Mr. Padilla was convicted of possession of a controlled substance in 1997 and 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was convicted of a firearm offense as a result and sentenced to six months in jail. He was released in 2002. Eleven years later, despite having lived peaceably with his family for more than a decade, ICE arrested Mr. Padilla at his home and held him in mandatory detention for the next six months. Ultimately, Mr. Padilla was

---

[2] Although the government repeatedly asserts that the Ninth Circuit rulings apply to "terrorists," *see, e.g.*, Pet. Br. 2, the government has never identified an individual charged as a terrorist in the plaintiff classes, nor does it explain why its expansive interpretation of Section 1226(c) is necessary to protect national security. *See* Pet. App. 80a & n.6. In two other statutes not at issue here, Congress specifically authorized mandatory detention without bond hearings for national security detainees. *See* 8 U.S.C. § 1226a(a) (authorizing immigration detention with specialized review procedures in national security cases); 8 U.S.C. § 1537 (authorizing detention for noncitizens in proceedings before the Alien Terrorist Removal Court).

released on the minimum $1,500 bond after he received a custody hearing pursuant to a court order in a different case. *See* Responsive Brief of Plaintiffs.-Appellees at 9-11, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016) (Nos. 14-16326, 14-16779), 2015 WL 13699643 at *9-11.

Mr. Khoury also was released on bond after he was given a hearing before an immigration judge pursuant to a court order. *See* Pet. App. 109a-10a. Both Mr. Khoury and Mr. Preap ultimately prevailed on the merits of their removal cases and remain lawful permanent residents of the United States. *See* Unopposed Motion for Judicial Notice at 2, *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (No. 14-35482), ECF No. 11; Pet. App. 6a-7a, 64a.

III. Procedural History

A. *Preap*

On December 12, 2013, Mr. Preap, along with two other lead plaintiffs, filed a petition for a writ of habeas corpus and class action complaint. Pet. App. 60a. On May 15, 2014, the district court granted class certification and issued a class-wide preliminary injunction, finding that plaintiffs were likely to succeed on their claim that they were not subject to mandatory detention under Section 1226(c) because "the plain language of the statute commands [DHS] to apprehend specified criminal aliens 'when [they are] released,' and no later." Pet. App. 77a, 105a.

A unanimous Ninth Circuit panel affirmed, holding that on its plain language, Section 1226(c) applies only to individuals whom DHS detains "promptly" upon release. Pet. App. 27a. The court

noted that this interpretation was consistent with Congress's purpose of ensuring that noncitizens who present "heightened risks" associated with certain crimes are promptly transferred from criminal to immigration custody, and that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." Pet. App. 22a. Because the named plaintiffs were not detained until many years after their release from criminal custody, and because the government had not challenged the scope of the class, the court of appeals found it unnecessary to determine at the preliminary injunction stage the outer limits of a "prompt" detention, leaving that issue to be resolved in district court. Pet. App. 27a-28a.

B. *Khoury*

On August 1, 2013, Mr. Khoury and two other plaintiffs filed a petition for a writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated individuals in the Western District of Washington. Pet. App. 107a, 132a. On March 11, 2014, the United States District Court for the Western District of Washington certified a class and entered a declaratory judgment for plaintiffs. Pet. App. 107a-08a. On August 4, 2016, the Ninth Circuit affirmed on the basis of *Preap*. Pet. App. 58a-59a.

The Ninth Circuit denied the government's petitions for rehearing en banc in both *Preap* and *Khoury*. Pet. App. 139a-40a.

SUMMARY OF ARGUMENT

This case concerns the scope of a statute directing that the Secretary of Homeland Security "shall take into custody" individuals removable for specified reasons "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c). The statute imposes mandatory detention without any individualized showing of flight risk or danger, and was designed to require an immediate transition from criminal to immigration custody. It mandates that the Secretary shall detain such aliens "when . . . released" from criminal custody, and may release them only for specified witness protection purposes. *Id.*

The court of appeals correctly concluded that the mandate to detain "when the alien is released" means what it says. Where the Secretary does not detain an individual "when . . . released," but instead takes him into custody at some later point, the individual may still be detained, but pursuant to the ordinary detention regime, 8 U.S.C. § 1226(a), that governs all removal proceedings. Under that scheme, noncitizens may be detained, but are entitled to a hearing before an immigration judge and to release on bond if they prove they are neither a flight risk nor a danger.

The plain language and structure of Section 1226(c) compel the court of appeals' reading. The directive to the Secretary contained in paragraph (1) is mandatory: the Secretary "shall take into custody." And it specifies a particular point in time to do so: "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Moreover, the limitation on release contained in Section 1226(c)(2) refers back to

an "alien described in paragraph (1)," incorporating the whole of paragraph (1), including the "when . . . released" language. *Id.* § 1226(c)(2). Thus, the only noncitizens subject to mandatory detention, and denied a hearing on flight risk or danger, are those who are detained "when . . . released" from criminal custody.

This interpretation is also supported by the purpose of the statute. Congress's concern was with noncitizens removable on enumerated grounds who were coming out of criminal custody. It sought to require the Secretary to maintain continuous custody, a result that obtains only if the statute's plain language, requiring detention "when the alien is released," is taken at face value. Under the government's reading, that text is negated and the immigration authorities would be able to defer detention until years after the individual is released from criminal custody—precisely the state of affairs Congress wanted to prevent.

The government's contrary interpretation either effectively reads "when . . . released" out of the statute, or reads it to mean merely "after" or "while" released. *See* Pet. Br. 13-18. Both moves are contrary to the statute's text: paragraph (c)(1) specifically directs the Secretary to detain "when the alien is released," and paragraph (c)(2) restricts release only of "alien[s] described in paragraph (1)," which includes the "when . . . released" clause. And the text and purpose of the statute make clear that the term "when" refers to the time of release, and not some undefined time after release.

Were there any doubt about the meaning of Section 1226(c), the constitutional concerns raised by the government's reading would counsel strongly against it. Mandatory detention without an individualized hearing or any opportunity to prove the absence of flight risk or danger is a rare and limited exception to the general due process principles governing civil detention. This Court has upheld it only in the "narrow" circumstances where the detention was closely tied to the purpose of effectuating removal, and the individual respondent conceded that the statute applied to him and was detained within a day of his release from criminal custody. *Demore v. Kim*, 538 U.S. 510, 513-14, 526 (2003); Brief for Petitioner at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. The government's interpretation would expand the statute from the "narrow" exception this Court upheld in *Demore* into an authorization to pick up individuals who have been living peaceably in the community for years or even decades, and subject them to an irrebuttable categorical presumption of flight risk or danger. To the extent such an irrebuttable presumption can hold "when the alien is released" from criminal custody, the justification for such a presumption evaporates once the person has been at liberty. The individual's time in the community permits an immigration judge to assess whether, in fact, the individual poses such a risk and requires detention.

The government invokes *Chevron* deference, but it is inappropriate here for three reasons: (1) the command to detain "when the alien is released" is unambiguous; (2) constitutional concerns trump deference; and (3) in habeas corpus review of

executive detention, there is no place for deferring to the executive's interpretation of its own detention authority. Moreover, even if *Chevron* deference were applicable, the BIA's interpretation of Section 1226(c) in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), which would impose mandatory detention on persons who have lived in the community for years and demonstrably pose no flight risk or danger, leads to arbitrary results and would not survive even deferential review.

The government cites practical concerns with complying with Section 1226(c)'s mandate if it is read to require immediate detention. But it offers no support for such practical problems, and the available evidence refutes the government's concerns. Moreover, as this Court reaffirmed last term, "practical considerations . . . do not justify departing from the statute's clear text." *Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018).

Finally, the "loss of authority" cases do not support the government's interpretation. The interpretation adopted by the court of appeals does not deprive the government of its authority to detain noncitizens in removal proceedings. It simply directs them to the general detention regime.

Section 1226(c) directs that the Secretary "shall take into custody" certain noncitizens "when the alien is released" from criminal custody, requiring DHS to take immediate action. It does not, as the government would have it, grant the Secretary unfettered discretion to impose mandatory detention on individuals at any time, even decades, after they have been released from criminal custody.

ARGUMENT

I. THE TEXT AND STRUCTURE OF SECTION 1226(c) COMMAND DHS TO APPLY MANDATORY DETENTION "WHEN THE ALIEN IS RELEASED" FROM CRIMINAL CUSTODY, NOT AT WHATEVER TIME THE AGENCY DECIDES AFTER RELEASE.

The text, structure, and purpose of Section 1226 make clear that mandatory detention under Section 1226(c) applies only to noncitizens who are both removable on specified grounds and detained by immigration authorities "when . . . released" from criminal custody for a related offense. The government retains the authority to detain a noncitizen after she is released, but subject to the default detention framework in Section 1226(a).

A. The Text Imposes Mandatory Detention Only on Noncitizens Detained "When . . . Released" From Criminal Custody.

Section 1226(a) is the general detention rule for noncitizens pending removal proceedings. It provides that a noncitizen generally "may be arrested and detained pending a decision on whether the alien is to be removed from the United States" and that the government "may continue" that detention, 8 U.S.C. § 1226(a)(1), or "may release" the noncitizen on bond or conditional parole. *Id.* § 1226(a)(2). The implementing regulations instruct that the noncitizen may seek release from DHS, and if denied release, may obtain a custody hearing before an immigration judge. 8 C.F.R. §§ 1236.1(c)(8) & (d),

1003.19(a) (2018). At the hearing, the noncitizen bears the burden of proving that she is neither a flight risk nor a danger. Absent such a showing, the noncitizen remains detained pending removal proceedings. *Guerra*, 24 I. & N. Dec. at 39-40.

Section 1226(a) governs detention of persons in removal proceedings "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(a). As such, "Section 1226(a) sets out the default rule" for detention pending removal proceedings, while "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

Section 1226(c)(1) directs that immigration officials "shall take into custody any alien who" is deportable or inadmissible on one of four enumerated grounds, 8 U.S.C. §§ 1226(c)(1)(A)-(D), "when the alien is released" from criminal custody. *Id.* § 1226(c)(1). Section 1226(c)(2) provides that an "alien described in paragraph (1)" may be released only for witness protection.

The two paragraphs of Section 1226(c) operate together to define the exception to the default detention framework in Section 1226(a). The only noncitizens subject to mandatory detention are those who are removable on one of the grounds in paragraph (1)(A)-(D), and whom the Secretary detains "when . . . released" from criminal custody for related offenses. This conclusion flows directly from the text, which states that the government "shall take into custody" not *all* noncitizens removable on the grounds enumerated in paragraph (1)(A)-(D), but those who are taken into immigration detention "when . . . released" from criminal custody.

Neither paragraph (1) nor paragraph (2) standing alone effectuates mandatory detention. They must be read together because paragraph (2)—titled "Release"—specifies who may be released, while paragraph (1)—which is titled "Custody"—identifies who gets detained. As the court of appeals explained:

> This structure suggests only one logical conclusion: the release provisions of § 1226(c)(2) come into effect only after the government takes a criminal alien into custody according to § 1226(c)(1). And, correspondingly, if the government fails to take an alien into custody according to § 1226(c)(1), then it necessarily may do so only under the general detention provision of § 1226(a), and we never reach the release restrictions in § 1226(c)(2).

Pet. App. 17a.

The textual requirement that noncitizens be detained "when . . . released" limits mandatory detention to those whom the Secretary detains "at the time of" or "immediately" upon their release. The BIA in *Rojas* recognized that "[t]he statute does direct the [Secretary] to take custody of aliens *immediately* upon their release from criminal confinement," *Rojas*, 23 I. & N. Dec. at 122 (emphasis added), and that the respondent, who was detained on "the second day of his release on criminal parole," was "not *immediately* taken into custody by the Service when he was released from his criminal custody." *Id.* at 118, 119 (emphasis added). *Accord* Pet. App. 20a; *Sylvain v. Attorney Gen. of the United*

States, 714 F.3d 150, 157 n.9 (3d Cir. 2013) (noting that "[i]f anything, [*Rojas*] suggested that 'when' denotes immediacy").[3]

"Congress chose a word, 'when,' that naturally conveys some degree of immediacy, as opposed to a purely conditional word, such as 'if.'" *Castañeda v. Souza*, 810 F.3d 15, 38 (1st Cir. 2015) (Barron, J.) (citing Webster's Third New Int'l Dictionary 2602 (2002) (defining "when" as "just after the moment that")) (internal citations omitted). *Accord* Pet. App. 20a-21a. If Congress had intended to require mandatory detention at any time after a person is released from a triggering criminal sentence, it could have used the phrase "if the alien is released" or "after the alien is released," rather than "when the alien is released."

Congress "spoke with just such directness elsewhere in the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), § 303(b)(2), Div. C, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586]," where it authorized the government to act "at any time after" a condition is met. Pet. App. 21a-22a (quoting *Castañeda*, 810 F.3d

---

[3] The BIA did not define precisely what an "immediate" detention requires, but did conclude that a detention two days after release from criminal custody was not "immediate." *See Rojas*, 23 I. & N. Dec. at 118, 119, 122. The Ninth Circuit used the term "prompt," and also left the precise contours to be developed in further proceedings. Pet. App. 27a-28a. The "when . . . released" mandate requires immigration authorities to detain noncitizens immediately at the point of release, but does not specify a precise time period. Respondents concur with the BIA that 48 hours is not immediate.

at 38 (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added) (alteration in original))). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citing *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987)).

The conclusion that "when" means "when" and not "if" or "after" or "while" also accords with the well-established canon that exceptions to general rules should be narrowly construed. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). As the Court has recognized, Section 1226(c) is explicitly framed as an exception to Section 1226(a)'s general detention provision. *Jennings*, 138 S. Ct. at 837. Thus, the statute should be read narrowly to require mandatory detention only "when . . . released" and not expansively to invite mandatory detention "at any time after release" from criminal custody.

The plain meaning of Section 1226(c)(1) is reinforced when read in context with Section 1226(c)(2), which refers back to paragraph (1): "The [Secretary] may release an alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary [for witness protection]." As the court of appeals correctly concluded, "Congress selected its language deliberately" when it enacted Section 1226(c)(2), "thus intending that 'an alien described in paragraph

(1)' is just that—*i.e.* an alien who committed a covered offense and who was taken into immigration custody 'when . . . released.'" Pet. App. 14a (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see also Castañeda*, 810 F.3d at 36 ("Congress clearly intended for the cross-reference in (c)(2) to refer to aliens who have committed (A)-(D) offenses *and* who have been taken into immigration custody 'when . . . released' from criminal custody, in accordance with the [Secretary's] duty under (c)(1)." (emphasis added)); *Saysana v. Gillen*, 590 F.3d 7, 14-16 (1st Cir. 2009) (holding that the "when . . . released" clause cannot be excised from the definition of individuals subject to mandatory detention).

B. The Government's Contrary Reading Turns a Specific Mandate into a General Invitation, and Cannot Be Squared With the Statute's Text and Structure.

The government's contrary reading of Section 1226(c) would impose mandatory detention on individuals removable on the enumerated grounds not "when [they are] released," but *at any time after* they have been released from criminal custody—even if they have lived peaceably in the community for months, years, or decades. Its interpretation thus transforms a mandate to take custody at a particular point in time into a discretionary invitation to take custody at whatever time the Secretary decides after release from criminal custody.

The government advances two arguments in support of its interpretation, both of which are inconsistent with the text and structure of the Act. First, the government argues that Section 1226(c)(2)

affirmatively authorizes mandatory detention of all noncitizens removable for the grounds specified in subparagraphs (1)(A)-(D), because it refers to "alien[s] described in paragraph (1)." On the government's view, the "when . . . released" clause does not "describe" the noncitizens subject to detention in Section 1226(c)(1). Instead, it merely defines when an action of the Secretary should occur. Pet. Br. 9. *Accord Rojas*, 23 I. & N. Dec. at 121. Second, the government argues that even if the "when . . . released" clause does impose a duty, "the term "when" is best understood not to mean at the time of release, but "while" or effectively "any time after" release. Pet. Br. 17. Neither argument can be squared with the text.

i. "An Alien Described in Paragraph (1)" Means All of Paragraph (1).

The government's first argument would impermissibly rewrite Section 1226(c)(2)'s reference to "an alien described in *paragraph (1)*" to "an alien described in *subparagraphs (1)(A)-(D)*." Its reading effectively excises the rest of paragraph (1), and in particular the "when . . . released" clause. *See* Pet. Br. 14-15. But the plain text of paragraph (2) refers to *all* of paragraph (1), which includes the "when . . . released" clause.

On the government's reading, the "when . . . released" clause does no work, violating the basic rule that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *See TRW Inc., v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). As several courts have noted:

> To read the statute in a manner that allows [DHS] to take a criminal alien into custody without regard to the timing of the alien's release from custody would render the 'when the alien is released' clause redundant and therefore null.

Khodr v. Adduci, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010) (citation omitted) (citing cases).

The government argues that the "when . . . released" language only clarifies that the Secretary should not seek to detain noncitizens *before* they are released from state or federal criminal custody. Pet. Br. 18. But had Congress merely wished to prohibit mandatory detention *before* release, it would have said so. Indeed, Congress demonstrated just how it would do this at 8 U.S.C. § 1231(a)(4)(A), which directs that the government "not remove an alien who is sentenced to imprisonment *until the alien is released* from imprisonment." *Id.* (emphasis added).

The government's interpretation also eviscerates the very duty that Congress sought to impose: that the Secretary "shall take into custody" certain noncitizens "when [they are] released" and not at some later date of her choosing. On the government's reading, the statute requires no urgency at all. If "when . . . released" means only "at any time after" release, the Secretary's detention mandate becomes, in effect, discretionary, eliminating the continuous chain of custody that Congress sought to implement. *See infra* Part II.

The government argues that "adverbial" phrases cannot "describe" a noun ("an alien"), and therefore only the "adjectival" phrases of subparagraphs (1)(A)-(D) "describe" those who are subject to the statute. Pet. Br. 14-15. But the plain language of Section 1226(c)(2) refers to "paragraph (1)" without limitation, and as a grammatical matter, both "adjectival" and "adverbial" phrases can describe a noun. *See Castañeda*, 810 F.3d at 25. Consider, for example, a directive that says: "(1) Approach a man who is (A) a redhead and (B) wearing a blue jacket, when he arrives on the 3:00 train from New York. (2) Hand the man described in (1) this package." Even though the phrase "when he arrives on the 3:00 train from New York" is "adverbial" in the government's view, it plainly "describes" who should be given the package. It would violate the direction if one handed the package to a redheaded man with a blue jacket who arrives on the 4:50 train from Richmond. There is simply no rule of grammar, much less statutory construction, to support the view that only "adjectival phrases" can describe a noun.[4]

The government's interpretation also produces a statute that is "oddly misaligned." *Id.* at 26; *accord* Pet. App. 16a. If subparagraphs (1)(A)-(D) alone defined the detention mandate, it would erase the

---

[4] The government's inapposite grocery store hypothetical (*see* Pet. Br. 16) proves nothing, as it simply writes out the meaning of "when" by choosing a context in which the timing (whether you buy the groceries when the store opens or later) is immaterial. But in Section 1226(c), as in the hypothetical in the text above, timing is of the essence.

plain language referring to a "release[ ]." *See Saysana*, 590 F.3d at 14-16. Subparagraphs (1)(A)-(D) include individuals who are never subject to criminal custody in the first place. For example, subparagraph (A) includes noncitizens who "admit" to committing certain drug offenses, even if they are never arrested or convicted. *See* 8 U.S.C. § 1182(a)(2)(A)(i).[5] By definition, such individuals could never be subject to Congress's directive in paragraph (1) that the Secretary detain them "when . . . released."

By reading the "when . . . released" clause out of the definition of noncitizens covered by Section 1226(c), the government assumes that Congress gave the Secretary complete discretion over whether to detain individuals subject to subparagraphs (1)(A)-(D) in the first instance, but at the same time decided that, if the Secretary happened to detain them, she would be required to keep them detained. As the First Circuit explained, the government's interpretation

> incongruously . . . requires one to believe that Congress was so concerned about certain aliens who had never been in criminal custody, as the "when . . . released" clause contemplates, being out and about that it directed the [Secretary] to hold them without bond even though Congress left her complete

[5] Similarly, subsection (1)(D) includes spouses and children of accused terrorists, even though neither status is or could be a crime. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(IX).

> discretion to decide not to take them into immigration custody at all.

Castañeda, 810 F.3d at 27. The Ninth Circuit similarly noted the "incongruous consequences" of the government's interpretation. Pet. App. 17a-18a.

All of these problems are avoided if the reference to "an alien described in (1)" is read, consistently with its literal terms, to cover *all* of paragraph (1). The statute means what it says. The Secretary "shall take into custody" individuals removable on certain grounds "when . . . released" from criminal custody, and may not release them unless necessary for witness protection.

ii. "When the Alien Is Released" Does Not Mean "While" or "After" She Is Released.

The government's second attempt to turn the statute from a mandate on the Secretary to act promptly into an open-ended invitation to impose mandatory detention whenever she pleases is equally unpersuasive. The government argues that the phrase "when the alien is released" simply means "*while* the alien is released." Pet. Br. 17. This interpretation, rejected by the BIA itself, *see Rojas*, 23 I. & N. Dec. at 122, cannot be squared with Congress's language or purpose.[6]

---

[6] Indeed, because the BIA rejected it, the government's interpretation is contrary to the principle of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The government invokes *Chevron* deference to the BIA's decision. Pet. Br. 39-41. But in defending the agency's decision, the government must rely upon the rationale used by the agency. *See Chenery*, 332 U.S. at 196 ("a

As noted in *Castañeda*, 810 F.3d at 37, the primary dictionary definition of "when" emphasizes immediacy. *See* Webster's Third New Int'l Dictionary (2002) (defining "when" to mean "at or during the time that" or "just after the moment that" and "at any and every time that"). Although "when" can also mean "on the condition that," *id.*, that secondary definition is inconsistent with the remainder of Section 1226(c) and Congress's purpose. *Cf. Pereira*, 138 S.Ct. at 2117 (selecting among multiple definitions of "under" based on common sense and context); *see also Deal v. United States*, 508 U.S. 129, 131-32 (1993). If Congress had intended that secondary meaning of "when," it would have said "when the alien *has been* released," rather than "when the alien *is* released," which indicates a moment in time.

The government's interpretation also ignores the "cardinal rule" that "a phrase gathers meaning from the words around it." *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 596 (2004) (internal citation and quotation marks ommitted); *see also United States v. Willings*, 8 U.S. 48, 55 (1807) (explaining that "the context must decide in which sense ['when'] is used in the law under consideration."). The "when . . . released" language is part of a single, continuous sentence in paragraph (1). The words following the term "when"

---

reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"). The BIA squarely rejected the government's reading of "when."

demonstrate that mandatory detention must occur at the time of release, "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1). Congress was focused on the time of release from criminal custody, and did not intend for the Government to invoke mandatory detention at "any time after."

The government contends that because Section 1226(c) "does not specify a limitations period," Congress must have meant to authorize mandatory detention at any point after an individual's release. *See* Pet. Br. 20-21. But the mandate to take individuals into custody "when . . . released" is itself a limitations period. It directs the Secretary to detain "when the alien is released" from criminal custody—not twenty days, three months, or six years later.

The government objects that the lower court's reading of "when . . . released" "gives rise to grave line-drawing problems" regarding the meaning of "when." Pet. Br. 21. But the BIA itself had no difficulty finding that the "when . . . released" clause requires "immediate" action, and concluding that a delay of two days was not "immediate." *See Rojas*, 23 I. & N. Dec. at 118, 119, 122. *See also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Whether the "when . . . released" mandate requires detention at the point the person leaves confines of criminal custody or at some other point that day can be resolved in future litigation. All this Court need decide is that Congress did not mean to allow the Secretary unfettered discretion to detain an individual without a bond hearing months or years

after release. That is precisely the reading the government seeks here and applied to Respondents like Mr. Padilla, who was detained without a hearing *11 years* after he was released from a brief jail term. And in any event, as this Court reaffirmed only last Term, practical difficulties "do not justify departing from the statute's clear text." *Pereira*, 138 S. Ct. at 2118; *see also Burrage v. United States*, 571 U.S. 204, 218 (2014) ("[I]n the last analysis, . . . [t]he role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (citations omitted).

Moreover, the government's practical concerns are overstated. Discovery in parallel litigation in the First Circuit has shown that, where DHS does not immediately detain an individual upon release, the gap in custody is typically months or years in length, not weeks, hours, or minutes.[7]

The government's remaining textual arguments lack merit. The government suggests that Section 1226(c)(2) precludes the court of appeals' interpretation because it specifies that the sole exception to mandatory detention is for witness protection. *See* Pet. Br. 4. But that begs the question. Section 1226(c)(2) limits release only of those noncitizens, "described in paragraph (1)," who have been properly subjected to mandatory detention in the first place. Respondents do not ask the Court to

---

[7] *See* Adriana Lafaille & Anant Saraswat, *Supreme Court case has echoes in Massachusetts*, https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts (last visited Aug. 5, 2018) (discussing *Gordon v. Napolitano*, No. 3:13-cv-30146-PBS (D. Mass.)).

expand the witness protection exception. Rather, they argue that they are not subject to mandatory detention in the first place because they were not detained "when . . . released" from criminal custody.

In sum, the statute instructs that the Secretary shall detain noncitizens removable on enumerated grounds "when . . . released" from criminal custody, and subjects only those noncitizens detained "when . . . released" to mandatory detention. The government's contrary reading should be rejected.

II. THE COURT OF APPEALS' INTERPRETATION ACCORDS WITH CONGRESS'S PURPOSE OF REQUIRING THE SECRETARY TO ENSURE AN IMMEDIATE TRANSFER OF NONCITIZENS FROM CRIMINAL TO IMMIGRATION CUSTODY.

As set out above, the plain language of Section 1226(c) is unambiguous. It requires the government to detain a noncitizen "when . . . released" from underlying criminal custody. There is therefore no need to look beyond the statute's terms. However, the legislative history bolsters that plain language, showing that Congress enacted Section 1226(c) with a "limited but focused purpose[ ]:" to ensure an immediate transition from criminal to immigration custody until the noncitizens' removal. *Saysana*, 590 F.3d at 17. Only Respondents' reading accords with that purpose; the government's does not.

A. The Legislative History Shows That Congress's Purpose Was to Ensure the Immediate Transfer to Immigration Custody of Noncitizens When Released from Criminal Custody.

From its earliest iterations, the mandatory detention statute that culminated in Section 1226(c) required the immigration authorities to detain noncitizens with certain criminal histories when they are released from their sentences, eliminating any gap between criminal and immigration custody. Congress enacted the first mandatory detention statute in the Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 8 U.S.C. § 1252(a)(2) (1989)). That statute specified that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion* of the alien's sentence for such conviction" and "the Attorney General shall not release such felon from custody." *Id.* (emphasis added).

Subsequent amendments maintained the focus on an immediate transfer to immigration custody upon release from criminal custody. When some noncitizens argued that the statute could not apply to individuals released from incarceration through parole or other forms of supervised release, because their "sentence" had not yet been completed, Congress amended the statute to clarify that it required mandatory detention of individuals upon release from criminal custody "regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of

rearrest or further confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (Nov. 29, 1990) (codified at 8 U.S.C. § 1252(a)(2) (1991)); H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554, 1990 WL 188857, 158. *See also Matter of Eden*, 20 I. & N. Dec. 209, 212 (BIA 1990) (discussing the dispute over the meaning of "sentence" in mandatory detention cases).

In 1996, Congress twice more amended the mandatory detention statute, expanding the types of enumerated offenses that triggered mandatory detention. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (Apr. 24, 1996); IIRIRA § 303(b) (codified at 8 U.S.C. § 1226(c)). In AEDPA Congress continued to focus on maintaining custody without a gap, requiring that immigration authorities "shall take into custody . . . upon release . . . from incarceration." AEDPA § 440(c). AEDPA omitted the language directing that a period of parole or other supervision would not affect the requirement of mandatory detention upon release, but IIRIRA restored it, directing that immigration authorities "shall detain . . . when the alien is released, without regard to whether the alien is released on parole . . . ." IIRIRA § 303(b). Thus, at every point, Congress's concern was to require immediate transfer of immigrants in criminal custody to immigration detention. *See, e.g.*, House Conf. Rep. 104-828, at 210-11 (1996) (seeking to mandate detention when

noncitizens are "released from imprisonment" for a predicate offense).[8]

Reading Section 1226(c) to impose mandatory detention "any time after" release is also implausible in light of the Transition Period Custody Rules ("TPCR"), which were enacted at the same time as Section 1226(c) in the IIRIRA.[9] The TPCR permitted

---

[8] Proponents of the government's view have repeatedly sought to amend Section 1226(c), and Congress has repeatedly declined to do so. For example, in 2011, legislation was introduced in the House of Representatives that would have replaced the "when . . . released" clause with the following: "The [Secretary] shall take into custody any alien who [is inadmissible or deportable for a predicate crime] *any time after* the alien is released . . . ." See H.R. 1932, 112th Cong. § 2(b)(5) (2011) (emphasis added); *see also* Grassley Amendment 53 to S. 744, 113th Cong. (2013); H.R. 1901, 113th Cong. § 2(b)(3) (2013); H.R. 3003, 115th Cong. § 4(a)(3) (2017). Congress understood that such bills would "greatly expand[ ] the number of people subject to mandatory detention [under Section 1226(c)] by eliminating the requirement that the release from criminal custody be tied to the offense triggering mandatory detention" and apply "mandatory detention . . . to individuals who have long since been released from criminal custody for any offense listed in the statute and who are now leading productive lives in the community." H.R. Rep. 112-255, at 52 (Oct. 18, 2011).

[9] The TPCR mirrored the structure and mandate of Section 1226(c), directing that the Attorney General "shall take into custody" noncitizens with certain enumerated offenses, but permitted release in much broader circumstances. *See* IIRIRA § 303(b)(3)(B) (permitting the release of certain noncitizens who are "lawfully admitted to the United States" and "satisfy[] the Attorney General" that they pose no danger or flight risk, and the release of certain noncitizens who are "not lawfully admitted," "cannot be removed because the designated country of removal will not accept the alien, and satisf[y] the Attorney

the Attorney General to delay the effective date of Section 1226(c) for up to two years. *See* IIRIRA § 303(b)(2). Concerned that "the Attorney General did not have sufficient resources" to implement mandatory detention, the TPCR were "designed to give the Attorney General a . . . grace period . . . during which mandatory detention of criminal aliens would not be the general rule." *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). The need for a "transition period" makes sense only if Congress understood Section 1226(c) to require immediate detention at the time of release. Had Congress intended "when" to authorize detention "at any time after" release, there would have been no need to provide a two-year delay in its effective date to account for resource constraints. Immigration authorities could have simply taken their resource constraints into consideration in deciding when to detain individuals.[10]

General" that they pose no danger or flight risk). The text of the TPCR is set forth in the Appendix.

[10] Moreover, as explained in *Castañeda*, 810 F.3d at 29, the government's open-ended reading of Section 1226(c), if applied to the similar language in the TPCR, would leave many *more* individuals subject to mandatory detention during the transition period than thereafter. This would make the TPCR *broader*, not narrower, than Section 1226(c). But Congress "clearly intended [the TPCR] to be less encompassing" than the permanent rule in order to allow the agency flexibility while it built up its detention capacity. *Id.* If the government's reading is correct, it was actually required to subject even *more* people to mandatory detention under the transitional rules, thereby defeating Congress's goal of avoiding burdens on agency resources during the grace period prior to the new mandatory detention regime. *Id.*

B. The Government's Legislative History Arguments Lack Merit.

The government makes three unavailing arguments based on the statute's history. First, it relies heavily on a regulation implementing the 1988 Act that prohibited the release of "'a respondent . . . convicted of an aggravated felony'" from immigration detention. Pet. Br. 31-35 (quoting 55 Fed. Reg. 24,858, 24859 (June 19, 1990) (8 C.F.R. § 242.2(c)(1)). The government asserts this regulation applied mandatory detention to noncitizens regardless of any gap in custody, and that Congress implicitly adopted this interpretation when it enacted the 1990 Immigration Act.

This argument fails because there is no indication that Congress actually considered the regulation, which was promulgated only six months before Congress modified the mandatory detention provision. *See United States v. Calamaro*, 354 U.S. 351, 358-59 (1957) (refusing to afford any significance to a regulation that "had been in effect for only three years"). And even if Congress were aware of the regulation, the government has it wrong. The Immigration and Naturalization Service repeatedly acknowledged in issuing the regulation that the 1988 Act "requir[ed] the Attorney General to take custody of aliens convicted of aggravated felonies *upon completion of the alien's sentence*, and to retain such aliens in custody . . . ." 55 Fed. Reg. at 24,858 (emphasis added); *see also* 55 Fed. Reg. 43,326, 43,327 (Oct. 29, 1990) ("Section 242(a)(2) of the Act mandates that any alien convicted of an aggravated felony . . . be held without bond *upon completion of his or her sentence* pending deportation

proceedings and removal from the United States.") (emphasis added); *id.* (explaining that "[a]liens who are criminals generally *will be taken into Service custody to face exclusion or deportation from the United States rather than be allowed back into the community after release from a correctional institution*" and that "[t]his rule is necessary in order to ensure that aliens who are subject to exclusion or deportation from the United States *are released from correctional institutions to the custody of the Service*") (emphasis added).[11]

Second, the government cites the fact that the 1990 Immigration Act briefly restored discretion to release "any lawfully admitted alien" whom the Attorney General otherwise detained upon his or her release from criminal custody for an aggravated felony conviction. *See* Immigration Act of 1990, § 504, (codified at 8 U.S.C. § 1252(a)(2) (1991)). The government argues that because Congress did not refer to a previous release from criminal custody in *lifting* the mandatory detention requirement for this group in the 1990 Act, Congress was no longer concerned about whether immigration detention immediately followed release. *See* Pet. Br. 32 (citing *Rojas*, 22 I. & N. Dec. at 123). But this makes no sense, since the operative mandatory detention

---

[11] The government also cites an interim rule issued *following* the Immigration Act of 1990. Pet. Br. 33 (citing 57 Fed. Reg. 11,568, 11, 572 (Apr. 6, 1992) (8 C.F.R. § 3.19(h)). Because this regulation was promulgated *after* the 1990 Act, and there is no indication that Congress at any point considered, much less approved, this rule, it is "without significance." *Calamaro*, 354 U.S. at 358-59.

provision continued to include the requirement that an individual be detained "upon release of the alien." 8 U.S.C. § 1252(a)(2)(A) (1991).

Third, the government suggests that by amending the predecessor language in the 1990 Act—"upon release of the alien"—to the new clause, "when the alien is released," Congress intended to provide for mandatory detention "while" the noncitizen is released, rather than "immediately" or "at the time of" release. Pet. Br. 34-35. But nothing in the text or legislative history suggests that Congress intended to make any substantive change merely by changing "upon" to "when." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes"). Had Congress intended to authorize detention at any time after release, thereby dramatically expanding the population subject to mandatory detention, it would have said so directly.

The immediate predecessor to Section 1226(c), enacted in AEDPA, provided that mandatory detention applied "upon release of the alien from incarceration, [and that the Attorney General] shall deport the alien as expeditiously as possible." AEDPA § 440(c). IIRIRA changed this language to provide for mandatory detention "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation . . . ." IIRIRA § 303(b). The thrust of Congress's amendment from AEDPA to IIRIRA was thus to restore the provision for immediate detention "without regard to whether the alien is released on parole, supervised released, or probation." This clause had been inserted in the 1990 Act, but then

inexplicably dropped in AEDPA. However, there is no indication that the change from "upon" to "when" was intended to effectuate any substantive change to the statute.[12]

In sum, Congress's consistent focus has been on mandating continuous custody at the point that certain noncitizens are released from criminal custody, and not on granting the Secretary an open invitation to detain such individuals whenever she chooses.

III. CONSTITUTIONAL AVOIDANCE REQUIRES READING SECTION 1226(c) NARROWLY.

As set forth in Part I, the plain language and structure of Section 1226(c) unambiguously provide that mandatory detention applies only "when the alien is released" from criminal custody. But to the extent that the Court finds that Section 1226(c) is

---

[12] The government cites legislative history this Court relied on in *Demore v. Kim*, 538 U.S. 510, 518-19 (2003). *See* Pet. Br. 22. But at best that history shows that Congress considered a variety of ways to facilitate the removal of noncitizens with criminal offenses, including increasing detention bed space, expediting the removal process for noncitizens who are still in criminal custody, and subjecting noncitizens who were serving "underlying sentences" to continued immigration detention. *See, e.g.*, S. Rep. No. 104-48 (1995), 1995 WL 170285, at *3-4, *21, *23, *31-32. In any event, the cited Senate report was not associated with any particular bill. *Castañeda*, 810 F.3d at 34-35. Thus, it does not shed light on the question here, and there is no indication that Congress chose to "expand the role of mandatory detention haphazardly" rather than focus on ensuring the continuous detention of noncitizens leaving criminal custody. *Id.*

ambiguous, it should construe it narrowly to avoid the serious constitutional question presented by the government's expansive reading. This Court has never approved the categorical mandatory detention of individuals who are taken into custody after living peaceably in the community for years. Doing so would raise serious due process concerns. *See Jennings*, 138 S. Ct. at 842 ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Section 1226(c) is an exception to the general due process principle that civil detention requires an individualized showing of flight risk or danger at a fair hearing. This Court's cases establish that civil detention must not be punitive or arbitrary, and generally must rest on an individualized determination of the necessity for detention accompanied by fair procedural safeguards.

For example, in the criminal pretrial setting, the Court has upheld the denial of bail only where Congress provided stringent procedural safeguards, including a requirement that the government demonstrate probable cause to believe the detainee has committed the charged crime and "a full-blown adversary hearing" on dangerousness, at which the government bears the burden of proof by clear and

convincing evidence. *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Court has similarly upheld preventive detention pending a juvenile delinquency determination only where the government proves a risk of future dangerousness in a fair adversarial hearing with notice and counsel. *Schall v. Martin*, 467 U.S. 253, 277, 280-81 (1984). Civil commitment is constitutional only when there are "proper procedures and evidentiary standards," including individualized findings of dangerousness. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997); *see also Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement").

In the immigration setting, civil detention is justified only where it is necessary to effectuate removal, and the noncitizen poses a flight risk or danger pending removal. *Zadvydas*, 533 U.S. at 690-91. In *Zadvydas*, the Court interpreted the statute governing detention after a final order of removal to require release of a noncitizen if the government is unable to effectuate removal within six months and removal is not "reasonably foreseeable." *Id.* at 699-701. *Zadvydas* thus reaffirmed the due process requirement that civil detention must be closely tied to a legitimate purpose, and that it can only be imposed with adequate procedural safeguards. *Id.* at 690-91.

In the key instance where the Court has approved detention without an individualized hearing, *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld Section 1226(c) in a facial challenge to the statute, in a case where the noncitizen was

detained within a day of his release, and conceded that the statute applied to him. *See id.* at 513-14; *see also* Brief for Petitioner at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. As such, the Court did not consider the problems raised by the government's attempt in this case to excise the "when . . . released" requirement from the statute.

The Court in *Demore* emphasized that the mandatory detention regime is "narrow" and closely linked to the purpose of effectuating removal and protecting public safety, pointing to the expected brevity of the detention and the individual's concession of deportability for an enumerated crime. *See Demore*, 538 U.S. at 513-14, 526, 528, 529 n.12.

As interpreted by the government here, however, Section 1226(c) would authorize categorical mandatory detention, not only "when the alien is released" but years later. At that point—when an individual has lived peaceably in the community for years, and may well have strong family ties and a high likelihood of prevailing in her removal hearing—mandatory detention is no longer adequately linked to the government's interest in preventing flight risk and danger. As the court of appeals explained, "without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justified mandatory detention are still present." Pet. App. 22a-23a. Indeed,

> it is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks . . . . By any logic, it stands to

> reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.

Saysana, 590 F.3d at 17. *See also Castañeda v. Souza*, 769 F.3d 32, 43 (1st Cir. 2014), *rehr'g en banc granted, opinion withdrawn* (Jan 23, 2015) (concluding that any "presumption of dangerousness and flight risk is eroded by the years in which [an] alien lived peaceably in the community."). Indeed, in the *Khoury* case, immigration judges granted release on bond in 86 percent of cases involving individuals not detained "when . . . released" from criminal custody, but detained at some later point. *Supra* n.7. Similarly, in *Gordon v. Napolitano*, No. 3:13-cv-30146-PBS (D. Mass.), 51 percent of class members were granted bond. *Id.*[13]

Moreover, the passage of time after the individual is released from criminal custody also affects her chances of prevailing on the merits of her removal case. Individuals who have been living in the community may have increased their eligibility for relief from deportation, such as cancellation of removal, by strengthening their ties to the community, and so as a group have less incentive to

---

[13] The government argues that its reading is justified because Congress did not trust immigration judges to make bond decisions in some category of cases. *See* Pet. Br. 10. But this argument begs the question as to whom the statute applies. The fact that *some* noncitizens with criminal histories should be subject to Section 1226(c) does not shed light on how to read the statute.

flee. *See* 8 U.S.C. § 1229b(a)-(b). When the government violates the mandate to detain "when the alien is released" from criminal custody, the justification for applying an irrebuttable categorical presumption of mandatory detention thus erodes in two respects: the presumption that the individual will flee does not hold, and the likelihood that removal will actually occur diminishes.

Thus, if there is any doubt as to what its text compels, Section 1226(c) should be construed narrowly to impose mandatory detention only on individuals who are detained "when . . . released" from criminal custody. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that courts should reject an "otherwise acceptable" statutory interpretation if it raises serious constitutional concerns and an alternative interpretation is not "plainly contrary to the intent of Congress.").

Moreover, constitutional avoidance requires construing the statute consistently whether the deviation from the "when . . . released" requirement is a matter of days or years. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Section 1226(c) must be construed in a consistent way, whether it is applied to Respondent Juan Lozano Magdaleno, who was arrested and subjected to mandatory detention five years after finishing his criminal sentence, *see* Pet. App. 8a, 67a-

68a, or to any class member not detained promptly "when . . . released" from her criminal sentence.

IV. THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT.

A. *Chevron* Deference Does Not Apply to the BIA's Interpretation of Section 1226(c).

The government's bid for *Chevron* deference to the BIA's decision in *Rojas* should fail, both because deference is inappropriate here, and because the government's interpretation fails even deferential review.

This Court considers two questions when reviewing an agency interpretation of a statute under the *Chevron* framework. First, if Congress has "directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Second, "if the statute is silent or ambiguous with respect to the specific issue," the Court determines if the agency has adopted "a permissible construction of the statute," *id.* at 843, or one that is arbitrary and capricious, and therefore impermissible. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

Matter of Rojas does not deserve deference for three reasons. First, as set forth in Part I, the BIA's

interpretation in *Rojas* contravenes the statute's unambiguous demand of immediate detention.[14]

Second, as set forth in Part III, the BIA's interpretation raises serious constitutional concerns, and therefore does not warrant deference. *DeBartolo*, 485 U.S. at 574-75. Courts "assum[e] that Congress does not casually authorize administrative agencies" to adopt interpretations that push against constitutional limits. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

Third, deferring to the BIA's definition of the scope of the Executive's detention authority would be at odds with the federal courts' traditional exercise of *de novo* habeas corpus review of executive detention. "[T]he writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). Deferring to the Executive's interpretation of its own detention authority would undermine this core function of habeas review. "While the executive branch may administer detention statutes, a serious separation of powers issue arises when the executive may define the scope of detention power as well." Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L.

---

[14] Moreover, the government urges the Court to defer to part of *Rojas's* statutory analysis—i.e., that the "when . . . released" language does not define who is subject to mandatory detention—while advancing an argument directly contrary to *Rojas's* conclusion that the statute "direct[s] [DHS] to take custody . . . *immediately* upon [an individual's] release from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). The government cannot have it both ways.

Rev 143, 186 (2015); *see also* Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 157 (2004) (arguing that the Constitution vests detention power exclusively with Congress). Separation of powers counsels that the judiciary should not engage in "reflexive deference" to the Executive branch, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)—and particularly when the deprivation of liberty is at stake. *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Chevron* deference for permitting individual "liberties [to be] impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible . . . but by an avowedly politicized administrative agent").

Citing this very concern, the Court in *Zadvydas* refused to defer to the Executive with respect to immigration detention. As the Court explained, the habeas corpus statute grants the federal courts "authority to answer" whether "detention is, or is not, pursuant to statutory authority." 533 U.S. at 699. Thus, although habeas courts must "take appropriate account of the greater immigration-related expertise of the Executive Branch," they cannot "abdicat[e] their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700.[15]

---

[15] Although the government cites cases where the Court has applied *Chevron* deference in the immigration context, none of those cases involve the canon of constitutional avoidance or habeas review of executive detention. *See* Pet. Br. 39 (citing, *inter alia*, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999)).

In any event, even if the Court were to apply step two of *Chevron*, the BIA's interpretation should be rejected because it leads to arbitrary and capricious results that are "unmoored from the purposes and concerns" of the statute. *Judulang*, 565 U.S. at 64. *Rojas* simultaneously transforms a mandate to the Secretary to act at a particular time into an open-ended invitation, and would arbitrarily deny bond hearings to individuals who have returned to their families and communities, and lived peaceably and openly there for years.

B. The Government's Arguments Regarding State and Local Compliance with Detainer Requests Are Unavailing.

The government cites decisions by state and local governments to decline detainer requests as an additional reason for adopting its construction of the statute. *See* Pet. Br. 26-27. But as the Court recently noted in rejecting the government's similar arguments in a case involving interpretation of another immigration statute, such "practical considerations . . . do not justify departing from the statute's clear text." *Pereira*, 138 S. Ct. at 2118.

Even assuming that practical considerations were relevant, the government has not established that any serious problems actually pertain here. First, the record contains no evidence showing that declined detainer requests actually prevent DHS from taking prompt custody, much less whether or how often detainers are declined for individuals who fall within Section 1226(c). The government's own data suggest that its concerns are overstated: between fiscal years 2015 and 2017, law enforcement

agencies complied with *more than 94%* of detainer requests—more than 300,000 requests in total.[16] And in cases where law enforcement officials decline to do so, DHS has recourse to an array of other enforcement tools that enable it to detain individuals upon their release from criminal custody. These include arrangements with the overwhelming majority of counties nationwide to notify DHS of individuals' release dates,[17] and the deployment of DHS officers[18] and deputized local law enforcement

---

[16] *See* ICE, *Fiscal Year 2017 Enforcement and Removal Operations Report* 8-9, *available at* https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf (last visited Aug. 5, 2018) (reporting that DHS made 325,274 detainer requests in this period, with law enforcement agencies complying in 306,112 cases).

[17] *See, e.g.*, Immigrant Legal Resource Ctr., *The Rise of Sanctuary* 9 (Jan. 2018), *available at* https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf (last visited Aug. 5, 2018) (reporting based on DHS data that 94% of approximately 3,000 counties nationwide notify DHS when noncitizens are released from criminal custody). Indeed, in parallel litigation in the First Circuit, the government conceded that where DHS receives notice of an individual's release date, it can detain the individual "99 percent of the time" within the 48 hour period after release that the district court in that case permitted the government to take custody of an individual under Section 1226(c). Hrg. Tr. at 28:22-23, *Gordon v. Napolitano*, No. 13-cv-30146-MAP (D. Mass. Apr. 11, 2017), ECF No. 197.

[18] *See* ICE, Criminal Alien Program, https://www.ice.gov/criminal-alien-program (last visited Aug. 5, 2018).

officers at jails and prisons to apprehend individuals upon their release. *See* 8 U.S.C. § 1357(g).[19]

Second, Congress has directed the immigration authorities "to identify and track deportable criminal aliens while they are still in the criminal justice system, and to complete removal proceedings against them as promptly as possible" by way of the Institutional Hearing Program. *Demore*, 538 U.S. at 530 n.13 (citing 8 U.S.C. § 1228). These removal proceedings are completed while the noncitizens are in criminal custody, eliminating the need for ICE to seek to detain them at the time of release.

In sum, the government's practical arguments cannot justify a departure from the plain meaning of Section 1226(c).

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c).

Finally, the government contends that its interpretation is consistent with this Court's case law holding that where a statutory deadline does not

---

[19] The government argues that Congress was aware of policies limiting local assistance to immigration authorities at the time Section 1226(c) was enacted and thus could not have intended to require mandatory detention at the time of the person's release from criminal custody. *See* Pet. Br. 27. Whether or not Congress had any such awareness, the plain language Congress chose to enact discloses no intent to deal with such policies, but instead focuses on ensuring that DHS detain individuals without a gap in custody.

specify otherwise, the government does not lose authority to detain when it fails to do so within the required time. *See* Pet. Br. 27-30 (citing, *inter alia*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18, 720 (1990) (holding that even where the government fails to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance, the government may still detain that person before trial, as holding otherwise would "bestow upon the defendant a windfall" and impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants")).[20]

The "loss of authority" principle does not apply to this case for several reasons. First, the government does not in fact lose its authority to detain under the court of appeals' interpretation. The government still enjoys a presumption of detention, and the noncitizen will be released only if he can prove that he poses neither a flight risk nor a danger under Section 1226(a). Neither the government nor the public suffers the "severe penalty" of the release of dangerous persons, because the only individuals who will be released are those an immigration judge determines do *not* pose a flight risk or danger. *See Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) (explaining that bond must be denied if a person is a danger to the community); *Guerra*, 24 I. & N. Dec. at 38 (describing danger and flight risk test for bond). Indeed, because Section 1226(c) curtails rather than expands the government's discretion over detention,

---

[20] *See also Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998); *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986).

the effect of the Ninth Circuit's ruling is simply to reinstate the government's general authority under Section 1226(a) to detain or release individuals who are not timely detained under Section 1226(c). *See* Pet. App. 25a.

For the same reason, this is not a case where Congress neglected to "'specify a consequence for noncompliance with [a] statutory timing provision[],'" as the government claims. *Cf.* Pet. Br. 29 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003)). Because Section 1226(c) is constructed as an express exception to the general grant of detention authority, the law specifies that the failure to meet Section 1226(c)'s timing requirement renders that exception inapplicable and results in a reversion to the government's general detention authority. Thus, unlike the statutes in this Court's "loss of authority" cases, enforcement of the "when . . . released" time limit here does not involve the judiciary imposing a sanction of its own invention, but merely requires the agency to apply the detention scheme as Congress intended. *See* Pet. App. 25-26a; *see also Castañeda*, 810 F.3d at 40-43. Congress, not the courts, has made clear that the consequence of failing to detain promptly "when . . . released" is to revert to the ordinary detention authority.

Second, the "loss of authority" principle does not apply, as the court of appeals recognized, because it would lead to an outcome that is contrary to the detention framework Congress sought to implement. Pet. App. 26a-27a. Congress enacted the "when . . . released" clause in order to ensure a prompt transfer from criminal to immigration custody for noncitizens with certain crimes, to avoid the release of people

who present a danger to the community or a risk of absconding. Permitting the government to delay apprehension and instead detain people years after their return to their communities, without affording them any opportunity to show that they are not a flight risk or a danger, contravenes the purposes and design of the statute. *Accord Castañeda*, 810 F.3d at 41-42; *Saysana*, 590 F.3d at 17-18.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted,

Matt Adams
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue
Seattle, WA 98104-2244

Robert Pauw
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98103

Devin T. Theriot-Orr
SUNBIRD LAW, PLLC
1001 4th Avenue, Suite 3200
Seattle, WA 98154

Emily Chiang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON
901 5th Avenue, Suite 630
Seattle, WA 98164

Counsel for Khoury *Respondents*

Michael K.T. Tan
Counsel of Record
Cecilia D. Wang
Judy Rabinovitz
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Preap *and* Khoury *Respondents*

Vasudha Talla
AMERICAN CIVIL LIBERTIES
FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Anoop Prasad
Jingni (Jenny) Zhao
ASIAN AMERICANS
ADVANCING JUSTICE –
ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, CA 94111

Daniel Purcell
Grace Y. Yang
KEKER, VAN NEST &
PETERS LLP
633 Battery Street
San Francisco, CA 94111

Counsel for Preap
Respondents

Dated: August 6, 2018

APPENDIX

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), § 303(b), Div. C, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586 provides:

(b) EFFECTIVE DATE.-

(1) IN GENERAL.-The amendment made by subsection (a) shall become effective on the title III-A effective date.

(2) NOTIFICATION REGARDING CUSTODY.- If the Attorney General, not later than 10 days after the date of the enactment of this Act, notifies in writing the Committees on the Judiciary of the House of Representatives and the Senate that there is insufficient detention space and Immigration and Naturalization Service personnel available to carry out section 236(c) of the Immigration and Nationality Act, as amended by subsection (a), or the amendments made by section 440(c) of Public Law 104-132, the provisions in paragraph (3) shall be in effect for a 1-year period beginning on the date of such notification, instead of such section or such amendments. The Attorney General may extend such 1-year period for an additional year if the Attorney General provides the same notice not later than 10 days before the end of the first 1-year period. After the end of such 1-year or 2-year periods, the provisions of such section 236(c) shall apply to individuals released after such periods.

(3) TRANSITION PERIOD CUSTODY RULES.-

(A) IN GENERAL.-During the period in which this paragraph is in effect pursuant to

paragraph (2), the Attorney General shall take into custody any alien who-

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) RELEASE.-The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and-

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not

accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. The statutory text and structure confirm the BIA's interpretation that mandatory detention depends on the alien's criminal history, not when he was arrested 2
II. This Court's precedents confirm that the BIA's interpretation is correct 8
III. Respondents' position would contravene the basic purpose of Section 1226(c) 11
IV. The canon of constitutional avoidance does not provide a basis for creating a new gap-in-custody exception 15
V. The BIA's decision warrants *Chevron* deference 19

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 8, 10
Brock v. *Pierce Cnty.*, 476 U.S. 253 (1986) 8
Castañeda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 6
Clark v. *Martinez*, 543 U.S. 371 (2005) 15
Demore v. *Kim*, 538 U.S. 510 (2003) 9, 12, 16, 18, 19
Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 21
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 20
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 18
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 2, 5, 15, 17
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018) 13, 20
Negusie v. *Holder*, 555 U.S. 511 (2009) 21
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 8

Cases—Continued: Page

Rojas, In re, 23 I. & N. Dec. 117 (B.I.A. 2001) 1, 11, 12, 13, 20
Sylvain v. *Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) 9
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 1, 8, 9, 13

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 20
8 U.S.C. 1103(a)(1) 20
8 U.S.C. 1226(a) 8, 10
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) ..... *passim*
8 U.S.C. 1226(c)(1)(A)-(D) 2
8 U.S.C. 1226(c)(2) ..... *passim*
8 U.S.C. 1229b(a) 17
8 U.S.C. 1229b(a)(3) 17
8 U.S.C. 1229b(b) 17
8 U.S.C. 1229b(b)(1)(C) 17
8 U.S.C. 1231(a)(4)(A) 8
8 U.S.C. 1252(a)(2) (1988) 13
8 C.F.R.:
Section 242.2(c)(1) (1991) 14

Miscellaneous:

55 Fed. Reg. 24,858 (June 19, 1990) 13
Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143 (2015) 21
H.R. Rep. No. 255, 112th Cong., 1st Sess. (2011) 15

Miscellaneous—Continued: Page

S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 14
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 14

In the Supreme Court of the United States

No. 16-1363

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents contend that a criminal alien becomes exempt from mandatory immigration detention under 8 U.S.C. 1226(c) if he is not arrested within some undefined but vanishingly short period of time after release from criminal custody. That interpretation is contrary to the statute's text, context, history, and purpose; it is contrary to this Court's decisions interpreting similar statutes, *e.g.*, *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990); it is contrary to the longstanding interpretation by the Board of Immigration Appeals (BIA), after extensive consideration, in *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc); and it is contrary to common sense. Under respondents' interpretation, any time a gap in custody has occurred for whatever reason—even if the government was unaware that a criminal alien was being released and thus could not have arrested him immediately—the public would face the very same risks

of recidivism and flight by removable criminal aliens that Congress enacted Section 1226(c) to prevent.

Respondents' focus on the timing of the arrest is fundamentally misplaced. The statutory command that a criminal alien shall be arrested "when the alien is released," 8 U.S.C. 1226(c)(1), simply means that the Secretary's duty to arrest the criminal alien is triggered at that time. This case is instead about the independent statutory prohibition against releasing a detained criminal alien who has already been arrested. 8 U.S.C. 1226(c)(2). That prohibition applies to any "alien described in paragraph (1)," *ibid.*, meaning "any alien who—is inadmissible" or "is deportable" based on his criminal history, 8 U.S.C. 1226(c)(1)(A)-(D). Respondents have the requisite criminal history. So regardless of when they were arrested, the statute prohibits their release. This Court accordingly should reverse.

I. The Statutory Text And Structure Confirm The BIA's Interpretation That Mandatory Detention Depends On The Alien's Criminal History, Not When He Was Arrested

1. Congress has directed that the Secretary "may release an alien described in paragraph (1)" of Section 1226(c) "only if" a narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2). Paragraph (1) describes with specificity who such aliens are: "[A]ny alien who—is inadmissible" or "is deportable" because of certain criminal history or terrorist activity identified in subparagraphs (A) through (D). See 8 U.S.C. 1226(c)(1)(A)-(D). Respondents are aliens who are inadmissible or deportable under those specified provisions, and they agree that the "only" statutory exception does not apply. Section 1226(c) thus "expressly and unequivocally imposes an affirmative *prohibition* on" the Secretary releasing them. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847 (2018).

As the Court explained in *Jennings*, paragraph (1) mandates the arrest of any alien "who falls into one of the enumerated categories involving criminal offenses and terrorist activities," and paragraph (2) "then goes on to specify that the [Secretary] 'may release' *one of those aliens* 'only if'" the witness-protection exception is satisfied. *Id.* at 846 (emphasis added) (quoting 8 U.S.C. 1226(c)(2)). Each respondent is "one of those aliens," *ibid.*, so their release is therefore prohibited.

Respondents nonetheless contend that the Secretary may release them on bond. Respondents rely on paragraph (1)'s language providing that the Secretary "shall take into custody any alien who—is inadmissible" or "is deportable" under the specified provisions, "when the alien is released." 8 U.S.C. 1226(c)(1). Respondents interpret the timing clause to mean that, if the Secretary does not arrest a criminal alien until some (undefined) time after he is released, he becomes exempt from paragraph (2)'s prohibition against release.

But paragraph (2)'s prohibition against releasing a detained criminal alien is independent of the directive to the Secretary to arrest the alien, and it does not depend on when he was arrested. The prohibition applies to any "alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). And the phrase "when the alien is released" in paragraph (1) does not describe an alien at all. 8 U.S.C. 1226(c)(1). Rather, it specifies when *the Secretary* is to act. The phrase "when *the alien* is released" takes as a given that "the alien" has already been fully described, namely, as an alien who is deportable or inadmissible under the preceding subparagraphs, (A) through (D). *Ibid.* (emphasis added).

Respondents have no real answer. Their most common response is to elide the words "the alien" so that

the clause reads "when . . . released." Indeed, they omit the words "the alien" more than 50 times in their brief. Resps. Br. 2, 3, 6, 7, 8, 11, 12, 15, 16, 17, 18 n.3, 19, 20, 21, 22, 24, 25, 26, 27, 29, 32 n.8, 40, 41, 42, 43, 44 n.14, 50. But the full statutory text—"when *the alien* is released"—makes little sense unless the Secretary already knows who "the alien" is. Otherwise, the Secretary would not know who to arrest in the first place.

Respondents elsewhere assert (Br. 21) that "an alien described in paragraph (1)" means "*all* of paragraph (1)." But that is clearly wrong, because part of paragraph (1) clearly tells the Secretary to do something without describing the person who is the object of the Secretary's action: Paragraph (1) opens with the statement, "The [Secretary] shall take into custody any alien who * * * ." 8 U.S.C. 1226(c)(1). That passage does not describe the person who the Secretary shall take into custody. Nor does the adverbial timing clause "when the alien is released." That phrase instead says when the arrest should occur.

The layout of the statute drives home the point: The portions directed to the Secretary—the command to arrest any specified criminal alien, and to do so "when the alien is released"—are aligned flush left. See 8 U.S.C. 1226(c)(1). By contrast, the portions of paragraph (1) that describe the alien who shall be arrested are indented and set off with lettered subparagraphs (A) through (D). See *ibid.*

Respondents concede (Br. 23) that the timing clause is adverbial and thus modifies the directive to the Secretary to arrest criminal aliens by telling her when to arrest them. Respondents nonetheless contend (*ibid.*) that the adverbial clause could also describe the alien who should be arrested. They offer the hypothetical

(*ibid.*) of a directive that says: "(1) Approach a man who is (A) a redhead and (B) wearing a blue jacket, when he arrives on the 3:00 train from New York," and "(2) Hand the man described in (1) this package." Respondents correctly say (*ibid.*) that it would "violate the direction if one handed the package to a redheaded man with a blue jacket who arrives on the 4:50 train from Richmond." But that is not because of the meaning of "when he arrives." That is because respondents have added a further description of the man (that he arrives "on the 3:00 train from New York"), so a man arriving on the "4:50 train from Richmond" would be a different person. The statute here contains no such further description.

The real parallel question here is whether, if the courier did not get to the station until after the 3:00 train from New York had arrived, would the courier be excused from giving the package to the redheaded man with the blue jacket who arrived on that train? The obvious answer is no. The courier's lateness does not alter the description of the man or the mandate to deliver the package to him. Rather, it is better to be late than never. If the courier was late delivering the package, he might get into some trouble with his boss. But if he refused to deliver the package *because of his own lateness*, he would probably get fired.

2. Respondents' interpretation further conflicts with the statutory text because it effectively creates a second exception to paragraph (2)'s mandate to maintain detained criminal aliens once they have been arrested—notwithstanding that paragraph (2) expressly provides that there is "only" one exception, namely, for witness protection. 8 U.S.C. 1226(c)(2); see *Jennings*, 138 S. Ct. at 847. Respondents deny (Br. 28-29) that they are trying to create a second exception, asserting they "are not

subject to mandatory detention in the first place." But under respondents' position, individual criminal aliens who were initially subject to mandatory detention cease to be after they have been released for some period of time. That is a second exception to the mandate.

Respondents also fail to answer the "nose-on-the-face obvious" question of how long a gap is too long. *Castañeda* v. *Souza*, 810 F.3d 15, 51 (1st Cir. 2015) (opinion of Kayatta, J.). The preliminary injunctions reach any criminal alien who was not taken into custody "immediately." Pet. App. 8a, 59a. But respondents do not actually say that immediacy is required, *i.e.*, that any gap, no matter how short or how well justified, is too long. Instead, respondents say (Br. 18 n.3) that the statute "does not specify a precise time period." Indeed, they are not even consistent about how to describe the time period, sometimes describing it as "immediate" and elsewhere as "prompt." Compare Resps. Br. 2, 11, 14, with *id.* at 25, 43, 46. They assert in places (Br. 18 n.3) that "two days" is too long, but fail to say (Br. 39-40) whether "within a day" is acceptable.

Nor do respondents say whether any other factors would be relevant. See Gov't Br. 21. What if the alien was sentenced to time served or released without a sentence of imprisonment, so the government could not have learned when he would be released until after that had occurred? What if the Department of Homeland Security (DHS) did not have officers available in the vicinity to effectuate the arrest? What if DHS asked the jurisdiction to notify it when the alien was going to be released, but the jurisdiction declined to do so? What if the alien immediately fled upon his release and went into hiding to delay his arrest? What if, during a gap, the alien committed additional crimes?

Respondents assert (Br. 27) that these questions "can be resolved in future litigation." But the lack of answers goes to the heart of the case. If Congress had intended to create a statute of limitations for mandatory detention, making criminal aliens exempt if they are at large for some period of time, Congress would have *specified that period.*[1]

3. Contrary to respondents' contentions (Br. 21), the government's interpretation does not render the phrase "when the alien is released" superfluous. That phrase makes clear that the Secretary's duty to arrest criminal aliens is triggered when the alien is released from criminal custody—and remains an urgent priority so long as the criminal alien remains at large. See Gov't Br. 17-18. Eliminating the timing clause would eliminate the direction that the arrest should occur upon release—and weaken or eliminate the urgency. That would fundamentally change the nature and tenor of Congress's direction to the Secretary.

The timing clause also makes clear that the Secretary should not arrest a criminal alien *before* he is released from criminal custody. See Gov't Br. 18. Respondents assert (Br. 22) that, "had Congress merely wished to prohibit mandatory detention *before* release, it would have said so," such as by saying that the government must "'not remove an alien who is sentenced to

---

[1] Respondents obtained class certification and class-wide injunctions on the theory that criminal aliens are exempt if arrest is not immediate, and the ultimate question here is whether those injunctions are proper. So respondents cannot defend those injunctions simply by saying (Br. 27-28) that Congress did not permit mandatory detention "months or years after release." If some unspecified or variable period of "months or years" is the test, the injunctions should be vacated and the classes decertified.

imprisonment *until the alien is released from imprisonment.*'" *Ibid.* (quoting 8 U.S.C. 1231(a)(4)(A)). But Congress *did* say so: It directed that the arrest should occur "when the alien is released." And the fact that Congress could have said the same thing using different words does not mean that the words Congress used are superfluous. Rather, it is respondents' interpretation that renders parts of the statute superfluous: They effectively omit the words "the alien" from "when the alien is released" in paragraph (1), and omit "only if" from paragraph (2).

II. This Court's Precedents Confirm That The BIA's Interpretation Is Correct

1. This Court's precedents confirm that, even if DHS does not arrest a criminal alien "when the alien is released" (as respondents would construe that phrase), an arrest at a later time would not exempt him from mandatory detention. In interpreting similar statutes, this Court has consistently held that when Congress has determined that governmental action is so important that it "shall" occur within some specified time, but the government does not act until later, courts should not deprive the public of the benefits that Congress mandated the government's action to produce. See *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-158 (2003); *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998); *Montalvo-Murillo*, 495 U.S. at 717-722; *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986).

Those cases control here. Respondents contend (Br. 49) that those cases stand for a "'loss of authority' principle" that is inapplicable because DHS would retain the authority under 8 U.S.C. 1226(a) to detain criminal aliens if it provided a bond hearing and the alien did not prove he should be released on bond (or he failed to post

bond). But DHS *would* lose the authority (and be excused from the duty) that Section 1226(c)(2) prescribes: to maintain criminal aliens in detention without a bond hearing. In addition, under respondents' interpretation, if DHS failed to arrest a criminal alien immediately or promptly, the Secretary would thereafter be excused even from her mandatory duty under paragraph (1) to arrest the alien in the first place: that duty applies only "when the alien is released," 8 U.S.C. 1226(c)(1), and respondents interpret that mandate to expire after the passage of some unspecified period of time. See Resps. Br. 16-17, 27.

In any event, this Court has not adopted an obscure technical rule about loss of government authority. Rather, this Court's decisions reflect the common-sense point that important governmental action is better late than never. See *Montalvo-Murillo*, 495 U.S. at 720 ("[T]here is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of [the statutory time limit] occurs."); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 158 (3d Cir. 2013) (under the "better-late-than-never principle," "[b]ureaucratic inaction—whether the result of inertia, oversight, or design—should not rob the public of statutory benefits"). Here, the statutory benefit—indeed, the entire purpose of Section 1226(c)(2)—is to protect the public from criminal aliens by keeping them detained during their removal proceedings, without the prospect of release. See *Demore* v. *Kim*, 538 U.S. 510, 513 (2003). Governmental delay therefore should not deprive the public of those protections.

Respondents also seek to distinguish the *Montalvo-Murillo* line of cases on the grounds that Congress "specif[ied] a consequence for noncompliance with [the] statutory timing provision" because, in their view, Section 1226(a) would govern release of criminal aliens who were arrested after a gap in custody. Resps. Br. 50 (indirectly quoting *Barnhart*, 537 U.S. at 159) (brackets omitted). But the statute does not say that. Section 1226(a) permits release of an arrested alien on bond "[e]xcept as provided in subsection (c)." 8 U.S.C. 1226(a). Subsection (c) then prohibits the release of "an alien described in paragraph (1)" of that subsection. 8 U.S.C. 1226(c)(2). And paragraph (1) describes those aliens based on their criminal history—not on the timing of their arrest. The timing of the arrest thus has no bearing on whether a detained criminal alien can be released. Accordingly, under *Montalvo-Murillo*, criminal aliens cannot be rewarded with the prospect of release following any governmental delay.

2. Respondents argue (Br. 25) that the government would turn Section 1226(c) "into an open-ended invitation" for the Secretary to arrest criminal aliens "whenever she pleases," rather than "a mandate on the Secretary to act promptly." But respondents are attacking a strawman, and it is their position that renders the statute more discretionary.

The government agrees that paragraph (1)'s mandate to arrest criminal aliens is triggered when the alien is released from criminal custody. See pp. 7-8, *supra*. The difference between the parties' submissions arises only if arrest nonetheless does not occur immediately. Specifically, the disagreement is over (i) whether paragraph (1)'s mandate to arrest a criminal alien expires if the alien has been at large for some (undefined) period

of time; and (ii) whether a gap before arresting a criminal alien exempts him from paragraph (2)'s prohibition against being released.

The answer to both questions is no. On the first point, "when the alien is released" imposes a duty to arrest a criminal alien that begins at the time of his release—and that continues to impose a pressing obligation so long as the alien remains at large. On the second point, the timing of a criminal alien's arrest has no bearing on whether DHS must keep him in custody once he has been arrested: Regardless of when he was arrested, he is still "an alien described in paragraph (1)" because he has the requisite criminal history. Paragraph (2) thus always remains mandatory. *Montalvo-Murillo* confirms that point as well.

III. Respondents' Position Would Contravene The Basic Purpose Of Section 1226(c)

1. The government's interpretation of Section 1226(c) advances Congress's basic aims of arresting, detaining, and removing criminal aliens: Arrest should occur upon release and is always a pressing priority, and once a criminal alien has been arrested he must remain in custody during his removal proceedings. Respondents' interpretation, by contrast, would often allow the release of criminal aliens, and thereby recreate the very problems that Congress enacted Section 1226(c)(2) to prevent: Release would enable those criminal aliens to flee and thus evade removal, or to commit new crimes. And it would depend on a factor—a gap in custody—that is itself "irrelevant for all other immigration purposes." *Rojas*, 23 I. & N. Dec. at 122.

Respondents assert (Br. 29) that Congress sought "to ensure an immediate transition from criminal to immigration custody until the noncitizens' removal." We

agree. But respondents mistake a *means* Congress chose for solving a problem—directing the Secretary to arrest criminal aliens when they are released—for the problem Congress was actually trying to solve.

"Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122; see *Demore*, 538 U.S. at 513 ("Congress [was] justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers."). Congress was responding to extensive evidence gained from years of real-world experience demonstrating risks of recidivism and flight by criminal aliens who were at large. See *ibid.* Notably, that evidence was not limited to the risks posed by criminal aliens who were taken into immigration custody immediately and then released on bond. See, *e.g.*, *Demore*, 538 U.S. at 518 (discussing evidence that "nearly half" of removable criminal aliens "were arrested multiple times before their deportation proceedings even began"). Indeed, respondents have not identified *any* evidence before Congress that was limited to that specific cohort.

Respondents' interpretation is further unpersuasive because gaps in custody are inevitable and often beyond the government's control. See Gov't Br. 25-27. Respondents note (Br. 46-47) that state and local law enforcement agencies usually share release date information with DHS, and thus enable DHS potentially to arrest the alien immediately. But in a substantial number of cases, DHS is not furnished that information. See *id.* at 46-47 & n.16 (citing figures of non-cooperation on 19,162 occasions). DHS cannot feasibly arrest criminal

aliens immediately upon their release when DHS does not even know when they are being released.

More fundamentally, non-cooperation is only one possible reason for a non-immediate arrest. Other situations include when the criminal alien is sentenced to time served or no imprisonment and thus is released at the moment the judgment is imposed, without prior notice; when DHS lacks "the resources to appear at every location where a qualifying alien is being released," *Lora* v. *Shanahan*, 804 F.3d 601, 612-613 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018); or when despite the government's "most diligent efforts," "some errors in the application of the time requirements [still] occur." *Montalvo-Murillo*, 495 U.S. at 720. The fact that gaps in custody will irevitably occur makes it particularly unlikely that Congress "premise[d] the success of its mandatory detention scheme on the capacity of DHS to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Lora*, 804 F.3d at 612 (quoting *Rojas*, 23 I. &. N. Dec. at 128) (brackets omitted).

2. Section 1226(c)'s historical backdrop further supports the government's position. See Gov't Br. 30-35. Section 1226(c) was the culmination of a series of similar statutes mandating that the government "shall" arrest certain criminal aliens upon their release, and "shall not" release such aliens. *E.g.*, 8 U.S.C. 1252(a)(2) (1988). Regulations implementing those earlier provisions in turn provided that the prohibition against releasing such criminal aliens during their removal proceedings applied to any detained alien with the requisite criminal history, full stop. See 55 Fed. Reg. 24,858, 24,859 (June 19, 1990) (8 C.F.R. 242.2(c)(1)). Congress left that basic

two-part command unchanged in Section 1226(c), indicating that Congress did not intend to alter that commonsense rule.

Respondents assert (Br. 34) that "the government has it wrong." But respondents merely quote language from the regulatory preambles stating that arrest was to occur upon the alien's release—a point that is undisputed. Criminal aliens are sometimes arrested later, however, and the regulations specifically addressed what happened after the alien had been arrested. They provided that, "in the case of a respondent convicted * * * of an aggravated felony," the alien "*shall not be released from custody unless*" removal proceedings were complete and certain criteria were satisfied. 8 C.F.R. 242.2(c)(1) (1991) (emphasis added). The word "unless" plainly means that a detained alien with the requisite criminal history shall not be released for any other reason.

Respondents contend (Br. 34) "there is no indication that Congress actually considered the regulation" when it replaced the prior statute with Section 1226(c). But such a regulation had been in place for six years at the time, and Congress had considered "[a]ll aspects of the Government's efforts related to criminal aliens," including "fugitive apprehension" and "detention of criminal aliens." S. Rep. No. 48, 104th Cong., 1st Sess. 5 (1995). In any event, once a phrase "has been given a uniform interpretation by * * * the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation," without need for evidence of how many individual Members of Congress actually considered it. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

Respondents contend (Br. 32-33) that the "transition period custody rules" would be nonsensical if Section 1226(c) did not mandate arrest immediately upon release, because those rules provided that the Attorney General could delay the effective date of Section 1226(c) and thereby afford flexibility to accommodate short-term resource constraints. But the government agrees that Section 1226(c) requires arrest upon release—and indeed the mandate to arrest continues even if the arrest was not made immediately. See pp. 7-8, *supra*. The transition rules therefore are entirely sensible under the BIA's interpretation of the statute. Respondents also quote (Br. 32 n.8) *dissenting* views on a subsequent bill to amend Section 1226(c) that Congress never enacted. H.R. Rep. No. 255, 112th Cong., 1st Sess. 52 (2011). But the majority views explained that the proposals aimed to "make clear" that the gap in custody was irrelevant, regardless of "the proper reading" of Section 1226(c), because lower court decisions adopting respondents' interpretation "ma[d]e little policy sense." *Id.* at 19.

IV. The Canon Of Constitutional Avoidance Does Not Provide A Basis For Creating A New Gap-In-Custody Exception

Respondents rely (Br. 37-43) on the canon of constitutional avoidance. But as this Court recently emphasized when rejecting another effort by the Ninth Circuit to use avoidance to distort Section 1226(c), "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 138 S. Ct. at 843. Rather, the canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and a court is choosing between them. *Id.* at 842 (quoting *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005)).

For the reasons set forth above, there is only one plausible construction here: Criminal aliens do not become exempt from mandatory detention based on the happenstance of a gap in custody, because the phrase "when the alien is released" does not describe who is subject to mandatory detention, and thus does not narrow paragraph (2)'s prohibition against releasing detained criminal aliens. Otherwise, the public would be exposed to the very dangers of recidivism and flight that Congress enacted Section 1226(c) to prevent.

The avoidance canon is further inapplicable here because no serious constitutional doubt arises from the mere delay in arrest by DHS, much less at the moment a criminal alien is released from criminal custody. In *Demore*, this Court squarely upheld Section 1226(c). See 538 U.S. at 513. Respondents argue (Br. 2), however, that *Demore* applies only in "'narrow'" circumstances, and note (*ibid.*) that the alien "was detained within a day of his release." But this Court did not even mention that fact in its opinion, see Resps. Br. 13 (citing the government's brief in *Demore*), and the timing of an alien's arrest was not a factor in the Court's analysis.

Respondents assert (Br. 40) that "when an individual has lived peaceably in the community for years, and may well have strong family ties and a high likelihood of prevailing in her removal hearing—mandatory detention is no longer adequately linked to the government's interest in preventing flight risk and danger." But the class-wide injunctions here are not limited to aliens who have "lived peaceably in the community for years," "have strong family ties," and have a "high likelihood of prevailing." *Ibid.*[2] They exempt any criminal

---

[2] Mandatory detention does not apply if an alien demonstrates in a *Joseph* hearing that he "was not convicted of [a] predicate crime,"

alien who was not arrested "immediately," regardless of the duration of the gap, the reasons for it, what the alien has done in the interim, or what his prospects of success might be. Pet. App. 8a, 59a.

The fact of a non-immediate arrest does nothing to change the alien's criminal history, which is the basis for Congress's categorical determination of dangerousness. A gap in custody also has no bearing on whether the alien's criminal history makes him inadmissible or deportable. And Congress has established no statute of limitations for removing a criminal alien. The mere fact of a gap in custody before arrest by DHS similarly sheds no light on a criminal alien's risk of flight or an immigration judge's ability to predict which criminal aliens will flee. Indeed, once a criminal alien has been arrested and put into removal proceedings where his criminal history will ordinarily establish that he is removable, the alien has something concrete and imminent to flee.

Respondents note that "[i]ndividuals who have been living in the community *may* have increased their eligibility for relief from deportation, such as cancellation of removal, by strengthening their ties to the community." Resps. Br. 41 (emphasis added). But they may not have. Indeed, many criminal aliens are categorically barred from receiving cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C), so for them any ties to the community would be irrelevant. Cancellation of removal is also a purely discretionary form of relief allowing aliens to remain notwithstanding that they are removable. See 8 U.S.C. 1229b(a) and (b) (Attorney General "may

---

or that DHS "is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Jennings*, 138 S. Ct. at 838 n.1.

cancel removal"). It is an "an act of grace" accorded in the Attorney General's "unfettered discretion." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). A criminal alien whose conviction removes any entitlement to be in the United States but who chooses to pursue such relief thus has sharply diminished interests in being released into society while that request is being considered.

2. Respondents invoke (Br. 8-9, 42-43) anecdotes about named plaintiffs who were arrested after being at large for some years, and whose conduct in the interim suggested that they might not actually have been a flight risk or danger to the community. But anecdotes about hand-picked plaintiffs with unusually long gaps in custody, unusually strong evidence of community ties, and an absence of criminal history in the interim provide no basis for concluding that Section 1226(c) becomes unconstitutional simply because of the passage of time. Rather, the proper way to raise a claim that Section 1226(c) has become unconstitutional as applied under the unusual facts of a particular case is for the individual criminal alien to bring an as-applied constitutional challenge in a habeas corpus action. See *Demore*, 538 U.S. at 532-533 (Kennedy, J. concurring) (discussing such situations); Gov't Br. at 46-50, *Jennings*, *supra* (No. 15-1204) (describing the contours of such a claim). That would be the safety valve here, not judicial imposition of a statute of limitations that Congress has not seen fit to enact.

In addition, the experience of others of the six named plaintiffs confirms that risks of recidivism do not automatically evaporate when a criminal alien has been released for "long stretches of time," Pet. App. 22a, much less within 48 hours. For example, in *Preap*, one of the

named plaintiffs (Mony Preap) had a seven-year gap in custody following his release on his underlying predicate offense—but in the meantime was convicted of battery following an arrest for inflicting severe corporal injury on his spouse. *Id.* at 64a. And in *Khoury*, one of the named plaintiffs (Alvin Rodriguez Moya) had a several-year gap in custody and then was released on bond under the Ninth Circuit's decision in *Jennings*—and, while released on bond, was arrested for and convicted of attempted murder of his ex-girlfriend and murder of her new boyfriend. See Gov't Br. 7 n.3.[3]

Those examples illustrate the inherent difficulty of predicting which removable criminal aliens will reoffend—even with individualized consideration of the alien's conduct during an extended period of time after his release from criminal custody. That is why Congress took immigration judges out of the prediction business for this category of aliens, and instead mandated detention of any alien with the requisite criminal history. This Court determined in *Demore* that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528. The avoidance canon thus cannot support the class-wide injunctions here.

V. The BIA's Decision Warrants *Chevron* Deference

For the reasons set forth above, Section 1226(c)(2) does not exempt criminal aliens from mandatory detention if there is a gap in custody. At a minimum, the BIA's decision in *Rojas* is entitled to *Chevron* deference.

---

[3] Rodriguez Moya was sentenced to 139 years of imprisonment. See Judgment, *State* v. *Rodriguez-Moya*, No. 3AN-15-03906CR (Alaska Sup. Ct. Aug. 10, 2018).

Respondents contend (Br. 43-44) that *Chevron* is inapplicable because the BIA's interpretation "contravenes the statute's unambiguous demand." But that is backwards, as the BIA adopted by far the best interpretation of the statute, and indeed the only construction that is plausible in context: Paragraph (2) of Section 1226(c) prohibits release of a detained criminal alien regardless of when he was arrested. See *Rojas*, 23 I. & N. Dec. at 127. At the very least, that interpretation—rendered after thoughtful consideration of the statute's text, context, purpose, and history, as well as practical considerations that arise in administering it—is entitled to *Chevron* deference.

For the first time in this litigation, respondents raise a novel argument (Br. 44-45) that applying *Chevron* here "would be at odds with the federal courts' traditional exercise of *de novo* habeas review of executive detention." That argument lacks merit. Regardless of how *Chevron* is applied, federal courts can still engage in habeas review of whether detention comports with due process. See pp. 18-18, *supra*. And this Court's decisions provide no basis for jettisoning the *Chevron* framework if the BIA's decision happens to be reviewed in a habeas action rather than on direct review in a court of appeals, or if the issue happens to involve detention rather than removal or relief from removal. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1). And this Court has found it "clear that principles of *Chevron* deference are applicable to this statutory scheme." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

Nor do respondents provide any sound basis for a departure from the *Chevron* framework here. They rely on a law review article—but it candidly admits that federal courts have "universally" applied *Chevron* in immigration-detention cases. Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L. Rev. 143, 164 (2015); see, *e.g.*, *Lora*, 804 F.3d at 611 (deferring to *Rojas* under *Chevron*); *Hosh* v. *Lucero*, 680 F.3d 375, 380 (4th Cir. 2012) (same). Moreover, the statutory question in this case is narrow and falls well within the BIA's bailiwick. It is undisputed that detention here would comport with the INA if no gap in custody had occurred, or if arrest was not immediate but respondents were provided a bond hearing. The only question is thus whether detention of a criminal alien is valid after a gap in custody but without a bond hearing, which depends on the meaning of the phrase "an alien described in paragraph (1)" and the function of the phrase "when the alien is released." That is a classic question for the BIA to resolve in the first instance. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("When the BIA has not spoken on a matter that statutes place primarily in agency hands, our ordinary rule is to remand to give the BIA the opportunity to address the matter in the first instance.") (brackets and quotation marks omitted).

In any event, this case provides no occasion to address any broader question about *Chevron*, because the BIA's decision would be correct even without it: Mandatory detention depends on an alien's criminal history, not the happenstance of when he was arrested.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018

No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

MONY PREAP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ADMINISTRATIVE AND IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
(Counsel of Record)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

QUESTION PRESENTED

Whether Section 1226(c) imposes mandatory detention, without an individualized hearing on flight risk and danger, even when the Department of Homeland Security does not promptly detain an individual when she is released from criminal custody.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT HAS NEVER APPLIED *CHEVRON* IN IMMIGRATION DETENTION CASES 6

II. THERE ARE STRONG REASONS NOT TO APPLY *CHEVRON* DEFERENCE WHEN INTERPRETING THE INA'S DETENTION PROVISIONS 8

A. The Scope Of *Chevron* Deference Is Not Unlimited 8

B. The Parallels Between Immigration Detention And Criminal Law Counsel Against Application Of The *Chevron* Framework To Questions Concerning Detention Authority 11

C. *Chevron* Deference Is Incompatible With Courts' Traditional Exercise Of Habeas Review As A Check On Executive Detention Power 17

CONCLUSION 22

APPENDIX: List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abramski v. United States,
134 S. Ct. 2259 (2014) 12

Bolling v. Sharpe,
347 U.S. 497 (1954) 3

Boumediene v. Bush,
553 U.S. 723 (2008) 18, 19

Bridges v. Wixon,
326 U.S. 135 (1945) 14

Carachuri-Rosendo v. Holder,
560 U.S. 563 (2010) 7

Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 1, 2

Christensen v. Harris Cnty.,
529 U.S. 576 (2000) 9

City of Arlington, Tex. v. F.C.C.,
569 U.S. 290 (2013) 9, 10

Clark v. Martinez,
543 U.S. 371 (2005) 7, 20

Crandon v. United States,
494 U.S. 152 (1990) 12, 13, 15

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Demore v. Kim,
538 U.S. 510 (2003) 7

Esquivel-Quintana v. Lynch,
810 F.3d 1019 (6th Cir. 2016) 11, 13

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 7, 11

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948) 14

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 15

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 7

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 8, 9, 13

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 6

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 16

INS v. Elias-Zacarias,
502 U.S. 478 (1992) 6

INS v. St. Cyr,
533 U.S. 289 (2001) 16, 19

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Leocal v. Ashcroft,
543 U.S. 1 (2004) 7

Lopez v. Gonzales,
549 U.S. 47 (2006) 7

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 8

Matter of Garcia-Arreola,
25 I. & N. Dec. 267 (BIA 2010) 16

Matter of Saysana,
24 I. & N. Dec. 602 (BIA 2008) 16

Mellouli v. Lynch,
135 S. Ct. 1980 (2015) 7

Moncrieffe v. Holder,
569 U.S. 184 (2013) 7

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 17

Nijhawan v. Holder,
557 U.S. 29 (2009) 7

Padilla v. Kentucky,
559 U.S. 356 (2010) 14

Pereira v. Sessions,
138 S. Ct. 2105 (2018) 4

Rasul v. Bush,
542 U.S. 466 (2004) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Scialabba v. Cuellar de Osorio,
134 S. Ct. 2191 (2014) 6

Torres v. Lynch,
136 S. Ct. 1619 (2016) 7

United States v. Apel,
571 U.S. 359 (2014) 12

United States v. Mead Corp.,
533 U.S. 218 (2001) 9

Zadvydas v. Davis,
533 U.S. 678 (2001) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 9, cl. 2 18

OTHER AUTHORITIES

Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 NYU L. Rev. 143 (Apr. 2015) ..... *passim*

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*,
1989 Duke L.J. 511 (June 1989) 8

Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059 (2011) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (Apr. 2006) 11

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 17

David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002) 15

David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169 (May 2010) 10

Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1 (2006) 16

Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833 (Dec. 2011) 2

Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363 (Feb. 2014) 2

Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 Geo Immigr. L.J. 99 (2017) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 Brook L. Rev. 1241 (2011) 5

Michael Kagan, Chevron's *Liberty Exception*, 104 Iowa L. Rev. (Forthcoming 2019) ..... *passim*

Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 Drexel L. Rev. 323 (2017) 5

Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 Geo. Immigr. L.J. 313 (2012) 5

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 10

Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153 (2004) 18

Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (Apr. 2001) 11

Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014) 11

INTEREST OF *AMICI CURIAE*

Amici are seven professors whose expertise and scholarship addresses the applicability of deference principles in immigration law.[1] *Amici* have produced substantial scholarship on immigration law, administrative law, and constitutional law, including scholarship that has been cited by this Court and others in immigration cases.

Amici submit this brief to address the government's argument that the Court should defer to the Board of Immigration Appeals' ("BIA") interpretation of 8 U.S.C. § 1226(c), which implicates the scope of the executive's detention authority, under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Petr. Br. 39. In *amici*'s view, the premise of that argument—that *Chevron* applies in the immigration detention context—is misguided. *Amici* have written about and have a substantial interest in the proper development of administrative law generally and of *Chevron* in particular in the immigration context, and they respectfully submit this brief to explain why the *Chevron* framework has no application here.

A full list of *amici* is attached as an appendix to this brief.

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed concurrently herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mandatory detention in the immigration context is exceptional. "It has little basis in history and few parallels in the preventative detention context." Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 NYU L. Rev. 143, 144 (Apr. 2015). Mandatory detention "strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate." Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 367 (Feb. 2014). The mandatory detention regime has "led to a massive increase in civil immigration detention in the United States," with hundreds of thousands of non-citizens detained each year. *Id.* at 365. When subjected to mandatory detention, non-citizens "may be deprived of their liberty in jails or prisons for days, months, or even years as they defend themselves in removal proceedings." Das at 145; *see* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833, 1843-44 (Dec. 2011).

In this case and others reviewing the propriety of immigration detention through habeas petitions, the lower courts have frequently applied *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which courts defer to an

agency's reasonable interpretation of an ambiguous statute. But these courts have not critically examined whether the *Chevron* framework applies in this context in the first place. There are strong reasons to conclude that it does not.

Indeed, unlike the lower courts, this Court has never applied *Chevron* when confronted with statutory questions concerning immigration detention—even though the Court has applied *Chevron* to other immigration-related issues, such as visa eligibility and discretionary relief from removal. The academic literature examining whether and how *Chevron* applies to immigration law provides important insights into why the Court is correct to have avoided *Chevron* in the detention context and why it should continue to do so.

As this Court's cases recognize and the scholarship reiterates, *Chevron* deference does not apply in all circumstances. Before the Court will apply *Chevron*, it must first inquire into whether Congress has delegated to the executive authority to interpret the statutory provision in question—and whether there are factors that would nonetheless preclude deference, such as a particularly strong need to preserve a robust role for the courts as a check on executive power. The physical liberty interests involved in the immigration detention context call for strong checks and balances, pushing against deference in this sphere.

Immigration detention closely resembles criminal punishment in that it implicates a primary concern of the Due Process Clause: the "freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497,

499 (1954). The Court has long declined to defer to the executive on questions of criminal law where such individual liberty interests are at stake, and even though immigration detention is preventative, rather than punitive, in nature, the rationale underlying that rule applies equally to immigration detention issues like that presented in this case.

In addition, permitting the executive not only to administer detention statutes, but also to define the scope of its own detention authority, raises serious separation of powers concerns. The Constitution assigns the detention power exclusively to Congress. And the judiciary historically has operated as an important check on executive detention through exercise of the writ of habeas corpus—a role that would be seriously compromised if courts were to afford "reflexive deference" to the executive's interpretation of detention provisions. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

In sum, the paramount physical liberty interests at stake, coupled with the courts' crucial separation-of-powers function in this area, counsel against judicial deference to the executive branch on questions of mandatory detention. The Court should not defer to the BIA's construction of 8 U.S.C. § 1226(c).

ARGUMENT

In recent years, courts and commentators have shown a strong interest in examining *Chevron*'s scope—and in exploring its limits.

Within this broader debate, a number of scholars, including *amici*, have questioned whether *Chevron* deference is appropriate in a variety of immigra-

tion law contexts. *See, e.g.*, Das, *supra* (arguing that courts should reject application of *Chevron* when exercising habeas review in statutory immigration detention cases); Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 Drexel L. Rev. 323, 331 (2017) (arguing for "an expansive principle of nondeference when courts settle interpretive ambiguity in crime-based removal statutes"); Michael Kagan, Chevron*'s Liberty Exception*, 104 Iowa L. Rev. (Forthcoming 2019), *available at* https://ssrn.com/abstract=3125736 (arguing that "*Chevron* deference is inappropriate when courts review the legality of a government intrusion on physical liberty," as in deportation and detention); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059 (2011) (arguing against *Chevron* deference in the area of asylum and refugee law); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 Brook L. Rev. 1241 (2011) (arguing against deference to Attorney General's decision about how to determine whether a crime involves moral turpitude); Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 Geo. Immigr. L.J. 313 (2012) (arguing against deference to the BIA in light of the BIA's flawed decisionmaking process and apparent bias).

This body of scholarship highlights the wide range of issues that fall under the general umbrella of "immigration law," and it touches on many issues that reach well beyond the question presented in this case. But the scholarship also reflects several

themes of particular relevance here. As the scholarship confirms, there are strong reasons not to apply the *Chevron* framework to questions of immigration detention, and especially to questions about the scope of the mandatory detention power.

I. THIS COURT HAS NEVER APPLIED *CHEVRON* IN IMMIGRATION DETENTION CASES

Although the Court on occasion has applied *Chevron* in immigration cases, *see, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the Court in other instances has declined to do so, *see, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

This variation in the Court's approach is not random. As Michael Kagan has pointed out, the Court's "practice with regard to *Chevron* in immigration cases follows a discernable pattern." Kagan at 5. The Court has applied *Chevron* deference in cases involving immigration benefits such as visa eligibility and discretionary relief from removal, but the Court has *not* deferred to the executive in cases involving deportation or detention. *See* Kagan at 5, 47, 52-53; *see also* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 Geo Immigr. L.J. 99, 116 (2017) (arguing that although "*Chevron* deference is operative in immigration law," "[t]he question of when *Chevron* deference applies [in the immigration context] has even more layers of complexity than in other areas of administrative law").

In at least seven decisions concerning the BIA's interpretation of criminal grounds of removal, the Court did not discuss or reference *Chevron*,[2] and in two others the Court mentioned *Chevron* but did not actually defer.[3] And, of particular importance here, the Court has never mentioned, much less applied, *Chevron* deference in a case related to detention. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); *Clark v. Martinez*, 543 U.S. 371 (2005); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Just last Term, in a case involving interpretation of the same statute at issue here, the government argued that its interpretation "warrant[ed] full deference under *Chevron*." Brief for Petitioners at 18, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). The Court declined to afford the executive's interpretation *Chevron* deference, and, in fact, the Court's decision says nothing about the *Chevron* doctrine at all.

This pattern may explain why the government cites only three cases to support its assertion that *Chevron* deference is warranted in this case, *see*

---

[2] *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

[3] *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, ... is owed no deference under the doctrine described in *Chevron*.").

Petr. Br. 39, each of which is materially distinguishable, as none involves detention. Even if *Chevron* properly applies to some immigration law issues (a premise that is itself subject to debate, *see, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring)), it does not follow that *Chevron* necessarily applies to each and every issue that can be described as involving immigration law. *See* Kagan at 5 ("It is important to differentiate the specific issues raised in different types of immigration cases.").

II. THERE ARE STRONG REASONS NOT TO APPLY *CHEVRON* DEFERENCE WHEN INTERPRETING THE INA'S DETENTION PROVISIONS

The Court has not yet explained its varied approach to agency deference in immigration cases. But the scholarly literature highlights several key principles that strongly support the Court's practice of not deferring to the executive in the detention context.

A. The Scope Of *Chevron* Deference Is Not Unlimited

There is an inherent tension in judicial deference to the executive. "[O]n its face" the concept of such deference "seems quite incompatible with Marshall's aphorism that 'it is emphatically the province and duty of the judicial department to say what the law is.'" Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 513 (June 1989) (brackets omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

(1803)); *see also Gutierrez-Brizuela*, 834 F.3d at 1151-52 (Gorsuch, J., concurring). Although *Chevron* has become widely accepted in at least some contexts, this passage serves as an important reminder that courts start from a baseline of non-deference: "Put another way, courts should give the authoritative interpretation of the law, unless there is good reason to do otherwise." Kagan at 12.

Ordinarily, to determine whether *Chevron* applies, the Court asks whether Congress has delegated to the agency authority to act with the force of law with respect to the question in controversy. *See, e.g., City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306 (2013); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (where there is doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). The Court has recognized that "a very good indicator of delegation meriting *Chevron* treatment" is an "express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). In some cases, courts have held that a general delegation of interpretive authority is enough "to decide that *Chevron* applies and that Congress intended for the agency to fill the ensuing gaps in the statute." Das at 178. But there is reason to be cautious in trying to discern delegation. *See Gutierrez-Brizuela*, 834 F.3d at 1154-55 (Gorsuch, J., concurring).

Even under a delegation framework, "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap." *City of Arlington*, 569 U.S. at 308-09 (Breyer, J., concurring in part and concurring in judgment). As Justice Breyer has explained, the Court's cases "make clear that other, sometimes context-specific, factors will on occasion prove relevant." *Id.* at 308-09; *see* Kagan at 16-17 (discussing context-specific approach to *Chevron*). For example, the subject matter of the relevant provision—"its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority"—is often pertinent to the inquiry. *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring in part and concurring in judgment); *see also* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169, 2220-21 (May 2010) (arguing that "administrative control should be tailored to administrative action").

These contextual factors can indicate that Congress did not intend—or perhaps *could not* intend—to delegate interpretive authority to an executive agency. *See* Das at 173 (describing "two-sided question regarding both delegation and nondelegation"). Courts therefore must examine whether there are factors that would push *against* delegation, "such as the need for checks and balances or the doctrines that might suggest a more robust role for federal courts in exercising review." *Id.*; *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 363 (1986) (discussing

conflicting themes within the debate over the administrative state: "the need for regulation" versus "the need for checks and controls").

Inherent in this type of context-specific approach, and in what scholars have termed *Chevron*'s "step zero," is the notion that deference has limits—and that there are areas of the law where, whatever Congress might have intended, *Chevron* is simply inapplicable. Kagan at 17; *see also, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (Apr. 2001); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 191 (Apr. 2006). Indeed, the Court has never "suggested that it would defer to agency views regarding the meaning of statutes that have traditionally been enforced by the courts, such as the criminal law or the antitrust laws." Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 760 (2014); *see also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (listing various circumstances in which the Court has recognized that *Chevron* deference "is categorically unavailable"), *rev'd*, 137 S. Ct. 1562 (2017).

B. The Parallels Between Immigration Detention And Criminal Law Counsel Against Application Of The *Chevron* Framework To Questions Concerning Detention Authority

Perhaps the clearest example of the limiting principles just discussed is the Court's consistent, longstanding refusal to apply *Chevron* in the criminal law context. That rule, and the reasoning under-

lying it, provides a strong foundation for rejecting *Chevron* in the immigration detention context as well.

1. It is beyond dispute that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). As Justice Scalia noted in his concurrence in *Crandon v. United States*, 494 U.S. 152 (1990), "a criminal statute[] is not administered by any agency but by the courts," and thus the judiciary does not defer to the executive's interpretations of criminal statutes. *Id.* at 177 (Scalia, J., concurring in the judgment). "The Justice Department, of course, has a very specific responsibility to determine for itself what [a criminal] statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.*; *see also Abramski*, 134 S. Ct. at 2274 ("Whether the Government interprets a criminal statute too broadly ... or too narrowly ... a court has an obligation to correct its error."); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Underlying courts' refusal to apply *Chevron* when interpreting criminal statutes is the recognition that the interpretation of criminal provisions implicates two concerns of utmost constitutional importance: separation of powers and the deprivation of physical liberty. A contrary rule would lead to an impermissible consolidation of power over individual physical liberty:

> The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws. ... And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.

Esquivel-Quintana, 810 F.3d at 1027 (Sutton, J., concurring in part and dissenting in part) (citation omitted). And, as Justice Scalia observed, because the executive is incentivized to take "an erroneously broad view" of criminal statutes in order to preserve the possibility that the statute "may cover more than is entirely apparent," deference to the executive in the criminal context would "replac[e] the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 177-78 (Scalia, J., concurring in judgment),

2. The same separation of powers concerns and weighty individual liberty interests that preclude deference in the criminal law context are also present where immigration detention is concerned. *See Gutierrez-Brizuela*, 834 F.3d at 1149, 1156 (Gorsuch, J., concurring) (reasoning that the separation of powers concerns that preclude deference to the executive on questions of criminal law apply with equal force in other contexts, including at least some immigration issues); Kagan at 5 (arguing that the Court "should be willing to state clearly that deference on questions of law is inappropriate in this context for the same reasons why it is inappropriate in questions of criminal law").

To start, criminal law and immigration detention both involve a deprivation of individual liberty that requires robust, independent review by the courts.

The Court has long recognized that deportation, where the government expels a person from the United States, implicates physical liberty concerns that warrant particular care: Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," the Court "will not assume that Congress meant to trench on [a non-citizen's] freedom beyond that which is required by the narrowest of several possible meanings of [statutory language]." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty.'"); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling." (citations omitted)). Much like imprisonment, the deprivation of physical liberty involved in deportation "calls for strong checks and balances between the judiciary and the executive branches, which makes judicial deference to administrative interpretations of the law especially indefensible." Kagan at 49.

The argument against deference is, if anything, even stronger with detention than with deportation: Immigration detention is not *like* imprisonment, it *is*

imprisonment. And mandatory detention under 8 U.S.C. § 1226(c) is imprisonment without the opportunity to appear for a bond hearing. By its very nature, this form of detention involves an onerous deprivation of individual liberty that requires robust judicial review in order to effectuate due process.

Of course, criminal law is unique in the sense that it involves *punitive* detention, while civil immigration detention "is by definition 'preventative.'" David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1006-07 (2002); *see Fong Yue Ting v. United States*, 149 U.S. 698, 728-30 (1893). But that is a distinction without a difference for *Chevron* purposes. As David Cole has noted, it is "precisely because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt" that "its use is strictly circumscribed by due process constraints." Cole at 1006-07. And punishment or not, freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. That core principle animates the Court's refusal to apply *Chevron* in the criminal law context, and it applies equally to immigration detention.

What is more, as with criminal law, the executive has strong incentives to interpret its own detention authority broadly so as to maximize its flexibility for future cases. *See* Das at 190 (the Department of Justice's interest in immigration detention "is no different than a criminal prosecutor: to 'err in the direction of inclusion rather than exclusion' and tak[e] a broad view of the scope of the statute" (quot-

ing *Crandon*, 494 U.S. at 177-78 (Scalia, J., concurring in judgment))). This theory is borne out in practice: The BIA has issued "scores of decisions expansively interpreting provisions of the mandatory immigration detention statute," such that thousands of non-citizens each year are subjected to mandatory detention without the possibility of release on bond. Das at 146.[4] Deference to the BIA's interpretation of the executive's detention authority, like deference to prosecutors' interpretation of criminal statutes, would accordingly "result in the application of an interpretive 'rule of severity.'" *Id.* at 189-90.

3. Immigration law also parallels criminal law in another relevant respect—in both contexts, courts apply a rule of lenity. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Although scholars have debated precisely how the rule of lenity interacts with *Chevron*, there is good reason to think "the rule of lenity should, where applicable, displace the *Chevron* framework entirely." Das at 200; *see* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 61 (2006) ("The protection of ... constitutional princi-

---

[4] For example, in other cases not at issue here, the BIA has interpreted various terms in 8 U.S.C. § 1226(c) to reach extremely broad populations of immigrants. *See, e.g.*, *Matter of Saysana*, 24 I. & N. Dec. 602, 605 (BIA 2008) (concluding that a release from criminal custody for any offense, even one that is not a basis for mandatory detention, may trigger mandatory detention); *Matter of Garcia-Arreola*, 25 I. & N. Dec. 267, 270 (BIA 2010) (overruling *Matter of Saysana* in light of widespread rejection in federal courts while insisting its prior interpretation was not contrary to the statute).

ples, a primary duty of the judiciary, must trump the rule of deference."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000) (explaining that lenity trumps *Chevron* because "[o]ne function of the lenity principle is to ensure against delegations"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (identifying the rule of lenity as a tool of construction a court might invoke to justify withholding *Chevron* deference). By instructing courts faced with an ambiguous statute to construe the statute against the government, the rule of lenity "obviates the need [for the court] to consider or defer to the agency's viewpoint." Das at 200. The "court never proceeds to *Chevron* step two, because the rule of lenity resolves any remaining ambiguities after other tools of statutory construction are applied" at step one. *Id.* Applied in this way, the rule of lenity "serve[s] its original purpose—to prevent harsh results in the face of ambiguities." *Id.*

C. *Chevron* Deference Is Incompatible With Courts' Traditional Exercise Of Habeas Review As A Check On Executive Detention Power

1. The rule that *Chevron* does not apply to criminal law is, at bottom, grounded in separation-of-powers principles—and, more specifically, the recognition that especially strong checks and balances are necessary where physical liberty interests are at stake.

Scholars have similarly recognized "a strong separation of powers rationale for why a federal court should prefer its own view over the [execu-

tive's] in interpreting detention authority." Das at 186; *see also* Kagan at 52 ("[T]he application of *Chevron* in habeas cases undermines the role the judiciary has traditionally played in reviewing deprivations of liberty."). The Constitution vests detention power exclusively with Congress, not the executive. *See* Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 157 (2004). Executive encroachment on this power violates "two of our most basic constitutional precepts: the proper separation of powers between the executive and the legislature, and the individual right not to be deprived of personal liberty without due process of law." *Id.* at 157-58. Although the executive may, of course, "administer detention statutes, a serious separation of powers issue arises when the executive may define the scope of detention power as well." Das at 186.

Courts, moreover, have historically played an important role in protecting the separation of powers through the exercise of habeas review. As this Court has observed, "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008); *see* U.S. Const. art. I, § 9, cl. 2. Habeas review "serves the twin purposes behind the Framers' choice to allocate power among three branches of government in the first place: to hold government accountable and to protect individual liberty." Das at 186; *see Boumediene*, 553 U.S. at 742 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that al-

located powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.[5]

These two factors—"the allocation of detention power to Congress and the historical role of habeas courts in protecting against unlawful executive detention"—weigh heavily against judicial deference to the executive's interpretation of its own detention authority. Das at 187. "If one branch of government infringes a person's physical liberty ... she should have the right to go before a separate branch of government for an assessment of whether this action was justified under law." Kagan at 49.

2. Consistent with this view, the Court has refused to defer to the executive in the immigration detention context, expressing concerns about the tension between deference and the duty of habeas courts to review the lawfulness of executive detention.

---

[5] It is well established that Article III courts serve as an important check on executive detention for both citizens and non-citizens alike. *See, e.g., Boumediene*, 553 U.S. at 747 ("We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief."); *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (explaining that 28 U.S.C. § 2241 "draws no distinction between Americans and aliens held in federal custody").

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court rejected the government's argument that its interpretation of a provision authorizing detention for non-citizens who have a final order of deportation against them was entitled to deference. *Id.* at 682. The government argued that under the plenary power doctrine, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Brief for Respondents at 20, *Zadvydas v. Davis*, 533 U.S. 678 (2001). And in a subsequent case, the Court noted that *Zadvydas* involved "ambiguities in the statutory text," *Clark v. Martinez*, 543 U.S. 371, 378-79 (2005), which in many contexts would induce the Court to defer to the executive under *Chevron*. But the Court did not defer. The Court instead undertook its own searching review of the statutory scheme, *Zadvydas*, 533 U.S. at 695-700, noting that "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights,'" *id.* at 692. The Court recognized that judicial "review must take appropriate account" of factors like the "immigration-related expertise of the Executive Branch," but the Court believed that courts could do so "without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700. The Court's decision suggests, in other words, that in these circumstances deferring to the executive would have been "antithetical to the core role of the habeas court." Das at 187.

Although *Zadvydas* could be read narrowly to apply only where there is a constitutional challenge to the executive's detention authority, *see Zadvydas*, 533 U.S. at 689, such an interpretation would "presume[] a false dichotomy: that some cases are about limitations on executive detention, while others are about the review of administrative immigration authority," Das at 148-49. "Any habeas challenge to the scope of an immigration detention statute—whether it focuses primarily on constitutional concerns or involves broader tools of statutory construction—ultimately requires review of the lawfulness of the executive's deprivation of an immigrant's physical liberty." *Id.* at 149. *Zadvydas* is thus better understood as recognizing that "there is something about the exercise of habeas corpus review over executive detention cases that creates, in and of itself, an exception to *Chevron* deference." *Id.* at 181.

* * *

The important liberty interests at stake, and the particular separation of powers concerns they raise, are incompatible with the notion of judicial deference to the executive on questions of detention authority. Such deference would present an especially poignant abdication of the judicial role given the statutory provision at issue here: Not only would the Court be deferring to the executive on who is subject to mandatory detention, it would be empowering the executive to define who is excluded from the opportunity to obtain a bond hearing—an important judicial check on executive power that Congress wrote into the statute. In these circumstances, it is the Court's

responsibility to decide for itself "what the law is," regardless of the executive's view.

CONCLUSION

For the foregoing reasons, the Court should not defer to the BIA's construction of 8 U.S.C. § 1226(c).

Respectfully submitted,

DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
(Counsel of Record)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, N.Y. 10036
(212) 326-2000

August 13, 2018

APPENDIX

AMICI CURIAE[1]

Gabriel J. Chin is the Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor at the University of California, Davis School of Law. He has published numerous articles on the intersection of criminal law, immigration law, and executive power.

Alina Das is a Professor of Clinical Law at New York University School of Law and Co-Director of the Immigrant Rights Clinic. Her scholarship focuses on deportation, detention, and the intersection of immigration and criminal law.

Jill E. Family is Commonwealth Professor of Law and Government at Widener University Commonwealth Law School and the Director of Widener's Law and Government Institute. Her scholarship draws on administrative and constitutional law to analyze the relationships among the three branches of government in setting, implementing, and interpreting immigration law.

Bassina Farbenblum is a Senior Lecturer at the University of New South Wales Law School, Director of the UNSW Human Rights Clinic, and Co-Director of the Migrant Worker Justice Initiative. She has written extensively on the rights of migrants, asylum seekers, and other non-citizens.

---

[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not necessarily reflect the views of the institutions with which *amici* are affiliated.

Michael Kagan is a Professor of Law at the University of Nevada, Las Vegas School of Law and Director of the UNLV Immigration Clinic. He is the author of numerous articles about immigration and asylum issues and how these issues interact with administrative law and executive power.

Shruti Rana is a Professor of International Law Practice and the Director of the International Law and Institutions Program at the School of Global and International Studies, Indiana University Bloomington. Her scholarship focuses on immigration and refugee law, and she has written numerous articles on the interaction between these issues and administrative law.

Rebecca Sharpless is a Professor of Clinical Legal Education and Director of the Immigration Clinic at the University of Miami School of Law. Her scholarship focuses on the intersection of immigration and criminal law and the role of the judicial branch as it relates to these issues.

No. 16-1363

In The Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, et al.,

Petitioners,

v.

MONY PREAP, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ADVANCEMENT PROJECT, ET AL. IN SUPPORT OF RESPONDENTS

ALINA DAS
Counsel of Record
JESSICA ROFÉ
WASHINGTON SQUARE
LEGAL SERVICES, INC.
245 Sullivan Street
5th Floor
New York, NY 10012
(212) 998-6430
alina.das@nyu.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Applying Mandatory Detention to Immigrants Who Have Returned to the Community Following A Past Conviction Leads to Arbitrary and Punitive Detention	4
A. Applying mandatory detention to immigrants living in the community arbitrarily forces judges to ignore years of evidence of community ties and rehabilitation following a past conviction	8
B. Applying mandatory detention to immigrants living in the community targets those who follow the law and make themselves available to immigration officials following a past conviction	13
C. Applying mandatory detention to immigrants living in the community punishes those most likely to have developed the equities to win their immigration cases following a past conviction	16
D. Applying mandatory detention to immigrants living in the community abruptly destroys the lives and families they have built since their past conviction	20

TABLE OF CONTENTS – Continued

Page

II. Bond Hearings Are Necessary to Protect the Liberty Interests of Immigrants Who Have Returned to the Community Following A Past Conviction 25

A. Bond hearings permit judges to assess flight risk and dangerousness based on the record immigrants have actually established in their communities following a past conviction, rather than a false presumption 27

B. Bond hearings prevent immigrants living in the community from suffering arbitrary and punitive detention 33

CONCLUSION 39

APPENDIX

LIST OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Page

CASES

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972) 6

Boumediene v. Bush, 553 U.S. 723 (2008) 5

Cid-Rodriguez v. Shanahan, 14-cv-3274 (S.D.N.Y. filed May 6, 2014) 18

Dang v. Lowe, No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780 (M.D. Pa. May 7, 2010) 13

Demore v. Kim, 538 U.S. 510 (2003) 2, 3, 6, 7

Giammarco v. Beers, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013) 38

Gordon v. Napolitano, No. 3:13-cv-30146-PBS (D. Mass.) 12, 21, 32

Jennings v. Rodriguez, 583 U.S. ___, 138 S. Ct. 830 (2018) 18, 28

Khoury v. Asher, 3 F. Supp. 3d 877 (W.D. Wash. 2014), *aff'd* 667 F. App'x 966 (9th Cir. 2016) 32

Lithus v. Ortiz, No. 2:18-cv-11520 (D.N.J. filed Jul. 7, 2018) 12

Marin-Salazar v. Asher, No. C13-96-MJP-BAT, 2013 WL 1499047 (W.D. Wash. Mar. 21, 2013) 30

Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998) 17

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

TABLE OF AUTHORITIES – Continued

Page

Nieto Baquera v. Longshore, No. 1:13-cv-00543-RM-MEH (D. Colo. filed Mar. 1, 2013) 29

Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014) 23

STATUTES

8 C.F.R. § 214.14 11

8 U.S.C. § 212(c) 17

8 U.S.C. § 212(h) 16

8 U.S.C. § 1101(a)(15)(U) 11

8 U.S.C. § 1226(c) 2, 3

OTHER AUTHORITIES

Adriana Lafaille & Anant Saraswat, *Supreme Court Case Has Echoes in Massachusetts*, ACLU MASS. (Aug. 5, 2018), https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts 12, 32

AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf 34

TABLE OF AUTHORITIES – Continued

Page

Arnold Giammarco, *After 50 Years as a Legal Immigrant, I Spent 18 Months in Immigration Detention Without a Bail Hearing*, PUB. RADIO INT'L'S THE WORLD (Nov. 30, 2016), https://www.pri.org/stories/2016-11-30/after-50-years-legal-immigrant-i-spent-18-months-immigration-detention-without 26

Benjamin Weiser, *Cuomo, Using Pardon Power, Gives Pair a 'Second Chance'*, N.Y. TIMES (Dec. 31, 2014), https://www.nytimes.com/2015/01/01/nyregion/cuomo-using-pardon-power-gives-pair-a-second-chance.html 8

Decl. of Alina Das, Esq. (on file with counsel) 14, 17

Decl. of Caroline Barnes, Esq. (on file with counsel) 24

Decl. of Claudia Valenzuela, Esq. (on file with counsel) 10

Decl. of Katharine Speer, Esq. (on file with counsel) 29

Decl. of Olga Tomchin, Esq. (on file with counsel) 24

Decl. of Robert Pauw, Esq. (on file with counsel) 30

Decl. of Sharon Giammarco (on file with counsel) 38

Decl. of Stacy Tolchin, Esq. (on file with counsel) 28

Decl. of Steffanie Lewis, Esq. (on file with counsel) 23

Decl. of Talia Peleg, Esq. (on file with counsel) 22

TABLE OF AUTHORITIES – Continued

Page

DETENTION WATCH NETWORK, ET AL., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT (Feb. 2018), http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf 33

DETENTION WATCH NETWORK, EXECUTIVE SUMMARY: EXPOSE AND CLOSE (2012), http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf 34

DETENTION WATCH NETWORK, EXPOSE AND CLOSE: BAKER COUNTY JAIL, FLORIDA (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Baker%20County.pdf 34

DETENTION WATCH NETWORK, EXPOSE AND CLOSE: HUDSON COUNTY JAIL, NEW JERSEY (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Hudson%20County.pdf 35

DETENTION WATCH NETWORK, EXPOSE AND CLOSE: STEWART DETENTION CENTER, GEORGIA (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Stewart.pdf 34

DETENTION WATCH NETWORK, REPORTED SUICIDE AT GEORGIA IMMIGRATION DETENTION CENTER (Jul. 12, 2018), https://www.detentionwatchnetwork.org/pressroom/releases/2018/reported-suicide-georgia-immigration-detention-center 37

TABLE OF AUTHORITIES – Continued

Page

Esther Yu His Lee, New lawsuit finds detained immigrants are forced to work for $1 a day, ThinkProgress (Apr. 17, 2018), https://thinkprogress.org/stewart-immigrant-forced-labor-9e3c73a88932/ 35

FREEDOM FOR IMMIGRANTS, PERSECUTED IN U.S. IMMIGRATION DETENTION: A NATIONAL REPORT ON ABUSE MOTIVATED BY HATE (Jun. 25, 2018), https://www.freedomforimmigrants.org/report-on-hate 37

House Conf. Rep. 104-828 (1996) 7

HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM–A TWO-YEAR REVIEW (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf 34

HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION (2010), https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf 36

HUMAN RIGHTS WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf 37

TABLE OF AUTHORITIES – Continued

Page

Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html 36

Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html 35

ICE Sexual Abuse Statistics, THE INTERCEPT (Apr. 11, 2018), https://theintercept.com/document/2018/04/11/ice-sexual-abuse-statistics/ 37

Khalil Cumberbatch, *The Day ICE Knocked on My Door*, THE MARSHALL PROJECT (Feb. 1, 2018), https://www.themarshallproject.org/2018/02/01/the-day-ice-knocked-on-my-door 5, 8

Kieran Nicholson, *Immigrants can sue federal detention center in Colorado over forced labor, appeals court says*, DENVER POST (Feb. 8, 2018), https://www.denverpost.com/2018/02/09/geo-group-aurora-immigration-detention-center-lawsuit/ 35

Mark Hwang, *How A Bond Hearing Saved Me From Deportation* (Oct. 3, 2017), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-bond-hearing-saved-me-deportation 26

TABLE OF AUTHORITIES – Continued

Page

Meera Senthilingam, *Half of recent immigrant detainee deaths due to inadequate medical care, report finds*, CNN (Jun. 20, 2018), https://www.cnn.com/2018/06/20/health/immigrant-detainee-deaths-medical-care-bn/index.html 37

NATIONAL IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (2012), http://static.prisonpolicy.org/scans/Invisible.pdf 36

NATIONAL IMMIGRANT JUSTICE PROJECT, ICE RELEASED ITS MOST COMPREHENSIVE IMMIGRATION DETENTION DATA YET. IT'S ALARMING, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet.....33

NATIONAL IMMIGRATION LAW CENTER, BLAZING A TRAIL: THE FIGHT FOR THE RIGHT TO COUNSEL IN DETENTION AND BEYOND (Mar. 2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf.....18

NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.....36

PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM (2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf.....36

TABLE OF AUTHORITIES – Continued

Page

Policy Memorandum 602-0050.1, Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, https://www.uscis.gov/news/alerts/updated-guidance-implementation-notice-appear-policy-memorandum 16

Randy Capps et al., Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families (Sept. 2015), https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families 21

S. Rep. No. 104-48 (1995) 6

SOUTHERN POVERTY LAW CENTER ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf 36

U.S. Army Veteran Returns Home After YLS Clinics Secure Settlement (Jul. 27, 2017), https://law.yale.edu/yls-today/news/us-army-veteran-returns-home-after-yls-clinics-secure-settlement 38

U.S. DEP'T OF HOMELAND SEC., HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf 33

TABLE OF AUTHORITIES – Continued

Page

U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (Dec. 11, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf.....34

U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf 33

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf.....11

Why We Must Abolish a 1996 Law that Has Destroyed Thousands of Families (VIDEO), https://www.immigrantjustice.org/staff/blog/why-we-must-abolish-1996-law-has-destroyed-thousands-families-video 5

STATEMENT OF INTEREST

Amici curiae are 62 community groups, immigrant rights organizations, law clinics, and legal service providers whose members and clients face the severe consequences of the Government's expansive application of mandatory immigration detention to individuals who have reintegrated into their communities following a past criminal conviction.[1] Despite the years during which our clients and members have demonstrated their lack of flight risk and dangerousness following a past conviction, the Government chooses to read the law to require their incarceration with no access to bond hearings. The Government thus bestows upon itself an enormous and terrifying power—to rip people away from their families and communities whenever immigration agents choose to initiate removal proceedings, with no review of evidence demonstrating the arbitrariness of their detention.

We have a profound interest in ensuring that the voices of our members and clients are included in the resolution of the legal issues in this case. Their stories demonstrate the real-life outcome of the Government's position: arbitrary detention that is neither required by law nor permitted by the Constitution.

---

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

The names of each organization are appended after the conclusion of this brief.

SUMMARY OF ARGUMENT

For our members and clients, the story often begins with a knock at the door. It is early, before the sun has risen. Bleary-eyed, pajama-clad, the occupant opens the door. Suddenly she is surrounded. People with guns enter. They search the house. Her children wake. The youngest begin to cry, to reach for her. Her husband attempts to hold the children back. The people with guns state they are from immigration. She stumbles through her things, attempts to show them her immigration paperwork. It does not matter. Handcuffs appear. Everyone is crying now. She is taken away. Days pass before her family finds out where she is. They withdraw every penny from the bank and come to immigration court, ready to beg for her release. Then they learn she cannot be bonded out.

In all of its forms, mandatory detention—incarceration without a bond hearing—is extreme. 8 U.S.C. § 1226(c) applies mandatory detention to immigrants who have been convicted of certain types of offenses "when the alien is released" from criminal custody for that offense. In *Demore v. Kim*, this Court observed that Congress enacted § 1226(c) in reaction to the growing number of immigrants in prison being released into the community, where immigration officials had struggled to "identify [them] . . . much less locate

them and remove them from the country." 538 U.S. 510, 518 (2003). No bond hearings were necessary because, in the view of Congress, an irrebuttable presumption of flight risk and dangerousness applied to immigrants in criminal custody for certain offenses.

As devastating as Congress's enactment of § 1226(c) was, the Executive Branch has stretched the law beyond recognition. Congress commanded federal immigration agents to identify certain removable immigrants in prison and ostensibly prevent flight risk and danger to the community through their continued immigration detention at the conclusion of criminal custody. Rather than follow that command, federal immigration agents now reach into communities to detain law-abiding individuals—months or years after the person's removable offense—and then claim no authority to consider the months, years, or even decades demonstrating the person's lack of flight risk or dangerousness.

The stories of our members and clients lay bare the absurdity of applying an irrebuttable presumption of flight risk and dangerousness to individuals already in the community following a criminal conviction. They are individuals who have been living in their communities peaceably for years following their removable offenses. Depriving them of bond hearings not only harms them, but destroys the lives and families they have built since their past conviction. Such an expansive view of mandatory detention entraps those most likely to make themselves available to immigration officials, as well as those most likely to win their immigration cases based on their years of equities.

Preserving our community members' and clients' access to bond hearings is not, as the Government suggests, a "windfall" or "reward." *See* Gov. Br. at 10, 11, 13, 21, 27, 28, & 40. It merely recognizes their liberty interests, and ensures that any deprivation of that liberty is based on the actual record rather than a false presumption.

ARGUMENT

I. Applying Mandatory Detention to Immigrants Who Have Returned to the Community Following A Past Conviction Leads to Arbitrary and Punitive Detention.

"I was just one week away from completing my master's degree in social work. I had meticulously planned every step toward obtaining it, ever since I had been incarcerated. That included working at various nonprofits, as both an intern and an employee, in addition to my schoolwork. . . . This would be the fulfillment of a promise I had made to myself about changing my legacy to reflect who I really was: a person who, despite having been incarcerated, had potential. But when the doorbell rang at 7 a.m., it was Immigration and Customs Enforcement waiting on the other side of the door.... By that night, I was at a jail in Kearny, New Jersey, all alone in a double-bunk cell with no idea of what was going to happen next.... I remember the calls with my daughters. My youngest was no more than three years

old, and every time she would get on the phone with me, she'd ask, 'Daddy, when are you coming home?'"

– Khalil Cumberbatch[2]

"I woke up. I heard knocking on the door. It was 7 o'clock in the morning. I peeked through the window and I see 'police' with vests. . . . He was like, do you recall 1997, a case? And I was like, yeah, I already did my probation . . . 15 years later they come knocking on the door, and they give me a piece of paper. . . . I was in detention for almost two years and six months fighting it. My daughter was four. We were getting prepared for her to go kindergarten. . . . [W]e were going to walk to school every day . . . It didn't turn out that way."

– Astrid Morataya[3]

"The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty. . . ." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). That liberty "'denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, . . . to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free

---

[2] Khalil Cumberbatch, *The Day ICE Knocked on My Door*, The Marshall Project (Feb. 1, 2018), https://www.themarshallproject.org/2018/02/01/the-day-ice-knocked-on-my-door.

[3] *Why We Must Abolish a 1996 Law that Has Destroyed Thousands of Families* (VIDEO), https://www.immigrantjustice.org/staff/blog/why-we-must-abolish-1996-law-has-destroyed-thousands-families-video.

men.'" *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

The lives that our members and clients have built during the months, years, and decades of liberty following a past conviction have meaning. Mandatory detention is offensive to liberty everywhere, but particularly so when applied to immigrants who have already returned to their communities. Our members and clients have reestablished their lives following their past convictions, disproving any presumption of flight risk and dangerousness that may have otherwise applied. Depriving them of their liberty without a bond hearing ignores the plain facts and creates unique, reverberating harms to immigrants, their families, and the immigration system as a whole.

The Government suggests that applying mandatory detention to our members and clients even after they have returned to the community fulfills Congressional intent. Gov. Br. at 22-25. But there is no indication that Congress sought the application of mandatory detention to individuals who have long been living productively in the community.

Congress enacted mandatory detention against a backdrop of reports and hearings regarding the growing number of immigrants in federal and state prisons.[4] As this Court observed in *Demore v. Kim*,

---

[4] *See, e.g.*, S. Rep. No. 104-48, at 21 (1995) (seeking detention without bond for noncitizens who would otherwise be released from their "underlying sentences" before the agency could complete

Congress was concerned that incarcerated noncitizens were being released to the community where immigration officials had struggled to "identify [them] . . . much less locate them and remove them from the country." 538 U.S. 510, 518 (2003). Congress thus enacted mandatory detention to prevent the release of incarcerated immigrants upon the completion of their criminal sentences. Bond hearings were unnecessary because, in Congress's view, an immigrant in criminal custody could be irrebuttably presumed to be a flight risk or danger to the community.

Congress's choice to enact mandatory detention has been painful. Every day, we see the harm done by mandatory detention to immigrants who would otherwise be released after serving their time.

But as flawed as mandatory detention is on its own terms, there is simply no indication that Congress sought to apply this irrebuttable presumption to those who have already returned to the community and are later targeted by immigration officials for removal proceedings. Such individuals have, by definition, been identified and located by immigration officials in their communities. Such individuals have a record following the completion of their sentence by which to judge their flight risk or dangerousness.

As the stories of our clients and members show, ripping these individuals out of their communities and

---

deportation proceedings); House Conf. Rep. 104-828, at 210-11 (1996) (seeking to mandate detention when noncitizens are "released from imprisonment" for a predicate offense).

denying them access to bond hearings based on years- or decade-old convictions results in arbitrary and punitive deprivations of liberty. Such outcomes go far beyond the terms of mandatory detention and lead to unique harms.

A. Applying mandatory detention to immigrants living in the community arbitrarily forces judges to ignore years of evidence of community ties and rehabilitation following a past conviction.

The Government points to no other context in which a past conviction carries with it an irrebuttable presumption of flight risk and dangerousness for someone living peaceably in the community. Our members and clients have accumulated months, years, and even decades of evidence eroding any presumption that may have attached to their long-ago convictions.

Khalil Cumberbatch[5] knows firsthand the unreasonableness of applying an irrebuttable presumption of flight risk and dangerousness to individuals who have old criminal records. Mr. Cumberbatch is the Associate Vice President of Policy at the Fortune

---

[5] The facts of Mr. Cumberbatch's case are detailed in his article and others discussing his story. *See* Khalil Cumberbatch, *The Day ICE Knocked on My Door*, THE MARSHALL PROJECT (Feb. 1, 2018), https://www.themarshallproject.org/2018/02/01/the-day-ice-knocked-on-my-door; Benjamin Weiser, *Cuomo, Using Pardon Power, Gives Pair a 'Second Chance'*, N.Y. TIMES (Dec. 31, 2014), https://www.nytimes.com/2015/01/01/nyregion/cuomo-using-pardon-power-gives-pair-a-second-chance.html.

Society, a nationally recognized criminal justice reform organization whose mission is to support successful reentry from incarceration.

Mr. Cumberbatch intimately understands the value of reentry support. At the age of twenty, Mr. Cumberbatch and a friend were convicted of a robbery and sent to prison. Individuals Mr. Cumberbatch met in prison encouraged him to rethink his path, and Mr. Cumberbatch committed himself to rebuilding his life. He finished college, and enrolled in graduate school for social work. He began working at the Fortune Society, giving back to others similarly seeking to rebuild their lives following incarceration.

Four years after his release from prison—and just a week away from completing his master's degree—immigration agents knocked on his door. His daughters were sleeping in the other room as he and his wife spoke to the officers. They told him that, as a lawful permanent resident from Guyana, he was deportable based on his old conviction. Then they took him away.

Mr. Cumberbatch found himself across state lines in a county jail in New Jersey. He remained there for five months. He sought bond from the judge, but the judge concluded he was powerless to consider Mr. Cumberbatch's clean record since his conviction, his family ties, work, education, or community service. Although Mr. Cumberbatch counseled others every day about the power of second chances, he was detained as an irrebuttable flight risk and danger to the community.

After a groundswell of community pressure, immigration officials released Mr. Cumberbatch after five months of detention. In December 2014, Mr. Cumberbatch was granted a pardon by Governor Andrew Cuomo. He returned to his family, received his master's degree, and continues his work to support the reentry of people leaving prison. His detention was unnecessary and arbitrary, a reflection of the government's over-expansive reading of the mandatory detention statute.

Mr. Cumberbatch had four years of evidence demonstrating his lack of flight risk and dangerousness. Many other immigrants have even longer periods of evidence following a past criminal conviction that immigration officials have ignored. Consider the case of **Astrid Morataya**.[6] Immigration agents waited approximately *fifteen years* to commence removal proceedings against her based on old drug offenses.

Ms. Morataya had lived in the United States since she was eight years old, after fleeing violence in Guatemala. The mother of three U.S. citizen children, Ms. Morataya was placed in removal proceedings in 2013 based on her old drug convictions, which she received during a period in her life when she was the victim of ongoing sexual abuse. Ms. Morataya ultimately testified against her abuser in court, aiding in his successful prosecution. When she was placed in removal

---

[6] The facts of Ms. Morataya's case are detailed in a declaration by her attorney. *See* Decl. of Claudia Valenzuela, Esq. of the National Immigrant Justice Center (on file with counsel).

proceedings years later, she was eligible for a "U visa",[7] a path to lawful permanent residence, based on her cooperation with law enforcement and an "inadmissibility waiver" due to her strong positive equities. She was ultimately granted this relief and remains in the U.S. with her family to this day.

Nonetheless, because Ms. Morataya was deemed an irrebuttable flight risk and danger based on her fifteen-year-old criminal record, she was forced to stay in detention for two-and-a-half years until her case was resolved. Held in county jails in Illinois and Wisconsin, she was twice placed in solitary confinement, once for having a sugar packet in her uniform that she forgot to dispose of at mealtime, and once for not being ready to leave her cell because she had begun menstruating and lagged behind her cellmates while trying to secure menstrual pads. All the while, she was needlessly separated from her family, never given the opportunity to seek a bond hearing.

Immigration arrests have skyrocketed over the past year, with a focus on "interior enforcement" against individuals living in the United States.[8] Untold numbers of immigrants are being plucked out of their communities today and placed in detention without bond hearings based on old convictions. **Jean**

---

[7] *See* 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14.

[8] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf (documenting rise in interior enforcement).

Harold Lithus[9] is one of those immigrants. A lawful permanent resident who came to the U.S. from Haiti twenty-five years ago, Mr. Lithus has two U.S. citizen children and has worked for the same company for eighteen years. This summer, Mr. Lithus was arrested in his home and taken to a county immigration jail in New Jersey. Mr. Lithus was denied a bond hearing because of a single drug possession conviction he received *twelve years* prior, for which he received time served. Because of that single conviction, Mr. Lithus continues to be held in detention, separated from his family, until the immigration court can adjudicate his application for cancellation of removal based on his significant family ties and work history in the U.S.

These stories are not outliers. According to available data from class action litigation in *Gordon v. Napolitano*, No. 3:13-cv-30146-MAP (D. Mass.), the majority of individuals deprived of a bond hearing had been detained over one year after their release from criminal custody, and nearly one in five were detained more than five years later.[10] Only a bond hearing will allow people's time at liberty following a criminal conviction to be considered.

---

[9] The facts of Mr. Lithus's story are detailed in his habeas petition. *See Lithus v. Ortiz*, No. 2:18-cv-11520 (D.N.J. filed Jul. 7, 2018).

[10] Adriana Lafaille & Anant Saraswat, *Supreme Court Case Has Echoes in Massachusetts*, ACLU MASS. (Aug. 5, 2018), https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts.

B. Applying mandatory detention to immigrants living in the community targets those who follow the law and make themselves available to immigration officials following a past conviction.

The irrebuttable presumption of flight risk and danger is rendered all the more absurd when one considers that many of the noncitizens affected by the Government's position in this case come to the attention of federal immigration authorities precisely because they affirmatively present themselves to immigration officials, either by submitting applications to the Department of Homeland Security, through travel and reentry at a port of entry, or otherwise complying with the law.

For example, **Y Viet Dang**[11] is a longtime lawful permanent resident from Vietnam who was detained without a bond hearing in 2010, when he applied for U.S. citizenship and came to immigration authorities to check the status of his application. He was detained and deprived of a bond hearing based on two decade-old convictions involving possession of a firearm and theft, for which he was eligible for relief from removal. In the ten years that had passed since his release from criminal custody, Mr. Dang had reintegrated into his community, working and raising his U.S. citizen child with his U.S. citizen wife, a U.S. Army lieutenant. At no time did he attempt to elude immigration authorities;

---

[11] The facts of Mr. Dang's case are detailed in *Dang v. Lowe*, No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780 (M.D. Pa. May 7, 2010) (Report and Recommendation).

in fact, he repeatedly made himself available to immigration officials through his applications to renew his lawful permanent resident card and to become a U.S. citizen.

As a federal court noted when it granted a habeas petition in his case, Immigration and Customs Enforcement ("ICE") waited almost ten years with no explanation to take Mr. Dang into custody. The court noted that "it appears from the record that Petitioner Dang is very likely to appear for his removal proceedings based on the various other applications he has filed over the years with ICE and the fact that he appeared to have cooperated with ICE with respect to these applications." After winning his habeas petition, Mr. Dang was released on bond. Like many others affected by the Government's position in this case, no purpose was served by his mandatory detention.

Consider the story of **Jennifer Frank**, a lawful permanent resident from the United Kingdom who had lived in the United States for nearly fifty years at the time of her detention.[12] After experiencing domestic violence and homelessness, Ms. Frank developed a drug addiction and received non-violent convictions. After her release from jail in 2009, she successfully participated in a drug rehabilitation program and worked with a local reentry and mentorship program. Ms. Frank was able to support herself, find an apartment

[12] "Jennifer Frank" is a pseudonym to protect Ms. Frank's identity. The facts of her case are detailed in a declaration by her attorney. *See* Decl. of Alina Das, Esq. (on file with counsel).

to live in with her daughter, and receive medical treatment for serious injuries she sustained during her period of homelessness. She also gave back to the reentry and mentorship program that had assisted her.

It was at this time that Ms. Frank also applied to renew her permanent resident card. After that, nearly a year-and-a-half after her release from criminal custody, her life was disrupted when immigration officers came to her home, arrested her, and transferred her to a detention facility several hours from her home. As a result, Ms. Frank was separated from her daughter, who was evicted from their apartment, and she was unable to continue her work with her reentry program. She spent five months in detention in a county jail without a bond hearing. She filed a habeas petition seeking a bond hearing, and immigration officials released her. While she was able to rebuild her life following detention, both she and her family went through significant hardships while she was detained.

Mr. Dang and Ms. Frank are not alone, and the numbers of people who will be referred to immigration officials for mandatory detention will only increase if the Government is permitted to continue its expansive reading of the mandatory detention statute. U.S. Citizenship and Immigration Services has recently issued guidance directing it to continue and expand its practice of issuing Notices to Appear and referring cases to ICE for potential initiation of removal proceedings

against noncitizens who apply for immigration benefits.[13] Mandatory detention will therefore ensnare many more individuals with old convictions who come forward to apply for citizenship, the renewal of green cards, and other immigration benefits. Despite voluntarily submitting to background checks and working with immigration officials, these individuals will be irrebuttably deemed flight risks and dangers under the Government's expansive interpretation of the mandatory detention statute.

C. Applying mandatory detention to immigrants living in the community punishes those most likely to have developed the equities to win their immigration cases following a past conviction.

By sweeping up individuals who are released from criminal custody and successfully reintegrated into their communities into the mandatory detention scheme, the Government's interpretation denies bond hearings to individuals who are *most likely* to win their immigration cases due to the equities they developed following their conviction. Many of the most common forms of relief from removal require judges to consider a noncitizen's rehabilitation and the passage of time following a criminal record, including cancellation of removal and waivers under § 212(h) and former

---

[13] Policy Memorandum 602-0050.1, Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, https://www.uscis.gov/news/alerts/updated-guidance-implementation-notice-appear-policy-memorandum.

§ 212(c) of the Immigration and Nationality Act. *See, e.g.*, *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Ignoring rehabilitation and the passage of time for purposes of mandatory detention is thus discordant with the rest of the removal system.

Take **Aba Dele**[14] as an example. Mrs. Dele was born in West Africa and experienced a difficult childhood. She was twice raped and struggled to find work to support herself financially. Afraid of the violence and instability of her life in West Africa, Mrs. Dele came to the United States on a visitor's visa. In 2006, her family began to struggle financially. Pregnant and facing eviction, Mrs. Dele took money from her employer to pay her rent, hoping she could repay the money with her next paycheck. Soon arrested, she was sentenced to probation and restitution, which she paid back in full. She rebuilt her life and became a home health aide for elderly individuals, paid income taxes, and was a prominent fixture in her church. She married a U.S. citizen and together they raise four children in addition to supporting other family members.

Eight years after her conviction, without any other incidents with the law, Mrs. Dele was dropping her youngest child off at his preschool when she was arrested and shackled by armed immigration agents. Mrs. Dele was detained in a county jail far from the city where she lived. Her four children were traumatized

---

[14] "Aba Dele" is a pseudonym to protect Ms. Dele's privacy. The facts of Ms. Dele's case are detailed in a declaration by one of her attorneys. *See* Decl. of Alina Das, Esq. (on file with counsel).

by the sudden separation from their mother, and her husband struggled financially to support the family.

At the time she was placed in mandatory detention, Mrs. Dele was eligible for adjustment of status based on her marriage to a U.S. citizen and a waiver of her conviction—relief that she was given at the conclusion of her removal proceedings two years later. In granting the waiver, the judge considered her clean record and hard work since her single conviction. Yet, according to the Government, none of those factors warranted release from detention.

Fortunately, Mrs. Dele's case was within the Second Circuit, which recognized the right to bond hearings within six months of detention prior to this Court's recent decision in *Jennings v. Rodriguez*, 583 U.S. ___, 158 S. Ct. 830 (2018). Mrs. Dele was released on bond at six months, but by then much of the damage to her husband and children had already been done. Mrs. Dele should never have been detained without a bond hearing in the first place.

Like Mrs. Dele, **Santos Cid-Rodriguez**[15] is someone subjected to mandatory detention whose strong equities following a past conviction led to a grant of relief from removal. Mr. Cid-Rodriguez had been a lawful permanent resident for over 20 years at the time of his

---

[15] The details of Mr. Cid-Rodriguez's case are described in his habeas petition. *Cid-Rodriguez v. Shanahan*, 14-cv-3274 (S.D.N.Y. filed May 6, 2014); *see also* NATIONAL IMMIGRATION LAW CENTER, BLAZING A TRAIL: THE FIGHT FOR THE RIGHT TO COUNSEL IN DETENTION AND BEYOND 37-38 (Mar. 2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf.

detention. His wife is a permanent resident, and he is the father of four children, three permanent residents and one U.S. citizen. Prior to his detention, he lived with his wife and three of his children in New York, and worked managing a bodega and for cleaning and medical equipment companies.

In 2014, Mr. Cid-Rodriguez was suddenly awoken and arrested in his bedroom by immigration officers, who detained him without bond. Mr. Cid-Rodriguez was detained based on a fourteen-year-old misdemeanor conviction for simple drug possession, for which he received a conditional discharge and served no jail time.

During Mr. Cid-Rodriguez's immigration detention, his 22-year-old son had to support the entire family without him. Detention exacerbated Mr. Cid-Rodriguez's chronic back condition, which arose from an on-the-job fall several years before. Mr. Cid-Rodriguez sought release, but was not permitted to have a bond hearing. The immigration judge noted that he would ordinarily be inclined to set a bond for someone who is only removable on the basis of a years-old conviction, but believed he was constrained by Board of Immigration Appeals precedent.

After months of detention, the immigration judge granted Mr. Cid-Rodriguez's application for relief from removal. The government waived appeal, and Mr. Cid-Rodriguez was finally released. Mr. Cid-Rodriguez subsequently became a naturalized citizen. It was clear to all involved that Mr. Cid-Rodriguez deserved to be

back with his family. But the immigration judge could not consider those same equities when Mr. Cid-Rodriguez initially sought a bond hearing.

As evidenced by the stories above, the government's argument that Congress wanted to detain without bond "*all* aliens with the requisite criminal history"—no matter how long ago the conviction occurred, or how much evidence the individual has of positive equities, family and community ties, work history, and rehabilitation they have accumulated in the interim—makes little sense given the weight these factors are given in the immigration system as a whole. Immigrants like Mrs. Dele and Mr. Cid-Rodriguez—and the many others profiled in this brief who successfully secured relief from deportation—are among those least likely to flee or pose a danger to the community given the long passage of time since their past convictions.

D. Applying mandatory detention to immigrants living in the community abruptly destroys the lives and families they have built since their past conviction.

In addition to irrationally targeting immigrants least likely to be flight risks and dangers, mandatory detention of immigrants who have long been in the community carries with it significant costs, not only to

the detained immigrants, but also to their family members whose lives are abruptly torn apart.[16]

Nhan Phung Vu[17] understands well the devastation that mandatory detention can cause to one's loved ones. A lawful permanent resident from Vietnam who has lived in the United States since he was just four years old, Mr. Vu was arrested and detained by immigration agents in a county jail in Massachusetts more than *ten years* after his release from custody for his past conviction.

The impact of Mr. Vu's mandatory detention on his U.S. citizen family was grave. During his detention, his wife and children lost their health coverage, which had been provided by Mr. Vu's employer. His stepson, who was suffering from Hodgkin's lymphoma, stopped receiving vital follow-up treatments he needed to recover from cancer. His daughter was unable to attend physical therapy. Both of Mr. Vu's daughters were plagued by nightmares. And Mr. Vu's wife struggled to make mortgage payments without Mr. Vu's steady income.

---

[16] Children with an incarcerated parent are more likely to experience hardship, residential instability, and family dissolution. When parents are detained without warning, "the sudden separation from their children can have potentially severe psychological impacts." *See* Randy Capps et al., Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families (Sept. 2015), https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families.

[17] The facts of Mr. Vu's case are detailed in the filings in *Gordon v. Napolitano.*, No. 13-cv-30146-PBS (D. Mass.).

Mr. Vu ultimately won release from detention after filing a petition for a writ of habeas corpus. However, the damage to his family's physical, emotional and financial well-being had already been done. Had Mr. Vu been afforded a bond hearing at the outset of his removal proceedings, he could have defended his removal proceedings from home, with his wife and children, and continued providing for his family, instead of being needlessly separated from them.

And Mr. Vu and his family are not alone. When **Alexander Lora**[18] was abruptly detained by immigration agents, his U.S. citizen family also suffered. Mr. Lora, a lawful permanent resident from the Dominican Republic who has lived in the United States since he was seven years old, was detained and placed in removal proceedings in 2014, nearly four years after a 2010 drug conviction for which he was sentenced to probation with no jail time. Immigration agents grabbed Mr. Lora in the middle of the street, shackled him in public view, and then took him to a detention center in New Jersey. Detention forcibly separated Mr. Lora from his family in Brooklyn, leaving behind his U.S. citizen fiancée, his ailing mother for whom he provides care, and his two-year-old son.

The impact of this abrupt detention was immediate. After Mr. Lora was detained, his little boy was placed in foster care. Mr. Lora's fiancée was blocked from bringing Mr. Lora's son for visitation due to the

---

[18] The facts of Mr. Lora's case are detailed in a declaration by his attorney. *See* Decl. of Talia Peleg, Esq. (on file with counsel).

jail's rules. Although Mr. Lora was eventually able to secure release through a habeas petition and ultimately won his removal case, he was still required to navigate the foster care system to regain custody of his son. This harsh outcome could have been avoided if Mr. Lora was afforded a bond hearing from the beginning.

Some of our clients and community members continue to struggle to pick up the pieces of their lives after being detained without bond years after an offense. **Sayed Omargharib**,[19] a lawful permanent resident for twenty-eight years, was a successful hairdresser in Washington, D.C. when he was arrested by immigration agents and detained for nearly two years due to a larceny conviction for having taken two pool cues following a dispute with an opponent in a local pool league. The Department of Homeland Security charged Mr. Omargharib with an "aggravated felony," charges that the U.S. Court of Appeals for the Fourth Circuit ultimately rejected two years later.

Although Mr. Omargharib was eventually vindicated, his abrupt mandatory detention did its damage. While detained, Mr. Omargharib lost both his home and his job. His credit was destroyed. He missed his son's high school graduation and the two became estranged. Now homeless, Mr. Omargharib is temporarily sleeping in a friend's basement in Virginia.

---

[19] The facts of Mr. Omargharib's case are detailed in *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). *See also* Decl. of Steffanie Lewis, Esq. (on file with counsel).

Mandatory detention of this kind also leads to particularly harsh consequences for vulnerable immigrants who would otherwise not be detained on account of their particular circumstances. **Cynthia Gonzalez** is one such example.[20]

Ms. Gonzalez had resided in the United States for over thirty years as a lawful permanent resident. After living in Florida for a number of years, Ms. Gonzalez moved to Tennessee to care for her sick and disabled father. Ms. Gonzalez became his primary caretaker. As his health began to improve, Ms. Gonzalez found fulltime work in a beauty supply store, was promoted to manager, and went back to college, earning a degree in 2012.

In 2014, as Ms. Gonzalez was leaving her house for work, ICE arrested her, alleging she was subject to removal based on convictions she received *thirteen years* prior for theft and forgery. Although she had only been sentenced to probation, ICE subjected her to detention without access to a bond hearing over a decade later.

In a matter of weeks, Ms. Gonzalez suffered humiliating treatment at three different facilities across the country. Ms. Gonzalez, who is a transgender woman, was denied her hormone medications—which she had been taking since 1999—and was subjected to solitary confinement and abusive conditions in immigration

---

[20] "Cynthia Gonzalez" is a pseudonym to protect Ms. Gonzalez's privacy. The facts of Ms. Gonzalez's case are detailed in a declaration by her attorney. *See* Decl. of Caroline Barnes, Esq.; *see also* Decl. of Olga Tomchin, Esq. (both on file with counsel).

detention. During her lengthy transfers between facilities, she was placed in 5-point shackles. Within the facilities, guards hurled denigrating slurs at her, referring to her as "it" or "he-she."

During Ms. Gonzalez's detention, her family and friends were very worried about her declining mental health. Ms. Gonzalez's detention also negatively impacted her family financially. Her father did not have the resources to cover both the loss of her income and the costs of her legal defense.

Ms. Gonzalez eventually won her case and was released from detention, but she continues to suffer from its effects today. Diagnosed with acute Posttraumatic Stress Disorder, she required counseling for her trauma from detention. Had she not been subjected to mandatory detention in the first place, immigration officials could have made appropriate decisions about her release at the onset of her removal proceedings in light of the years that had passed since her last offense.

II. Bond Hearings Are Necessary to Protect the Liberty Interests of Immigrants Who Have Returned to the Community Following A Past Conviction.

"It was a complete nightmare. The hardest part was being away from my wife and daughter, who was two years old at the time. Watching my daughter behind a pane of glass, I still remember her crying that she

wanted me to hold her, she wanted me to play with her like I used to. But I couldn't."

– Arnold Giammarco[21]

"When my family came to visit me in detention, I wasn't allowed any physical contact, so I couldn't hold my newborn daughters or my son. I was at a breaking point, and nearly ready to sign deportation papers when . . . I finally received a bond hearing. . . ."

– Mark Hwang[22]

As explained in Point I, mandatory detention results in unique harms when applied to immigrants who are no longer in criminal custody. They develop months, years, and even decades of equities following their past criminal conviction. They raise families, go to school, start new jobs, and rebuild their lives. They stand to lose everything they have rebuilt following a conviction if immigration officials may detain them at any point in time without access to a bond hearing.

Rather than recognizing the liberty interests these individuals possess, the Government claims that providing them with a bond hearing would be a "windfall" or "reward." Gov't Br. at 10, 11, 13, 21, 27, 28, &

---

[21] Arnold Giammarco, *After 50 Years as a Legal Immigrant, I Spent 18 Months in Immigration Detention Without a Bail Hearing*, PUB. RADIO INT'L'S THE WORLD (Nov. 30, 2016), https://www.pri.org/stories/2016-11-30/after-50-years-legal-immigrant-i-spent-18-months-immigration-detention-without.

[22] Mark Hwang, *How A Bond Hearing Saved Me From Deportation* (Oct. 3, 2017), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-bond-hearing-saved-me-deportation.

40. In doing so, the Government misconstrues the role that bond hearings play in this context as a check on unnecessary detention. In addition, the Government trivializes the harms our community members and clients face when they are detained without access to bond. Bond hearings are not "windfalls" or "rewards"—they prevent arbitrary and punitive detention for people who have long been living freely in the community.

A. Bond hearings permit judges to assess flight risk and dangerousness based on the record immigrants have actually established in their communities following a past conviction, rather than a false presumption.

Bond hearings permit judges to make decisions about flight risk and dangerousness based on facts rather than false presumptions. Despite the Government's expansive application of mandatory detention, some of our members and clients have been given the opportunity to seek bond hearings due to federal court intervention. Their stories are powerful. They demonstrate that, when provided an opportunity to present the full record of their lives in the years after a conviction, immigrants frequently demonstrate to immigration judges that they merit release on bond.

Consider the case of **Mark Hwang**,[23] a lawful permanent resident who was detained and separated from his twin daughters just after their birth.

Mr. Hwang has been a lawful permanent resident of the U.S. for nearly thirty years, having immigrated to the U.S. from South Korea when he was nine years old. In 2013, shortly after the premature birth of his newborn twin daughters, Mr. Hwang was detained by immigration officials after a traffic stop. He was shocked to learn that a marijuana conviction he received fifteen years prior now would subject him to mandatory detention. Shackled and transported to Adelanto Detention Facility, Mr. Hwang was forced to leave his U.S. citizen wife Sarah alone to care for their newborns and two-year-old son. He attempted to vacate his marijuana conviction while detained, but he was unable to attend the hearing due to his detention.

After six months of detention, Mr. Hwang was given a bond hearing. He was detained within the Ninth Circuit, which recognized the right to bond hearings within six months of detention prior to this Court's recent decision in *Jennings v. Rodriguez*. Given Mr. Hwang's strong community ties and compelling reasons to stay and fight his deportation in court, the immigration judge ordered him released on bond in 2013. Once Mr. Hwang was released, he was finally able to pursue post-conviction relief and ultimately

---

[23] The facts of Mr. Hwang's case are detailed in a declaration by his attorney. *See* Decl. of Stacy Tolchin, Esq. (on file with counsel).

had his marijuana conviction vacated. No longer deportable, his removal proceedings were terminated in August 2014, restoring his lawful permanent resident status. Without a bond hearing in which he established that he was neither a danger nor a flight risk, Mr. Hwang would have remained in detention where he would have been incapable of seeking vacatur of his conviction and may very well have been deported.

Permitting immigration judges to make bond decisions similarly saved **Erick Rogelio Nieto Baquera**[24] from unnecessary detention. A longtime resident of Colorado, Mr. Nieto first entered the U.S. in 1983 when he was only 11 months old and became a lawful permanent resident.

In 2013, Mr. Nieto was abruptly detained by immigration officials on the basis of a 2003 conviction he received for drug possession, for which he was sentenced to probation with no jail time. Mr. Nieto had a clean record over the past decade. He had cared for his family, worked two jobs, and began a moving and furniture delivery business. None of that could be considered, however, when he was detained, held in the GEO Detention Facility in Aurora, Colorado, where he remained for nearly six months. After Mr. Nieto filed a habeas petition, a federal district court ordered the government to provide him with a bond hearing.

---

[24] The facts of Mr. Nieto's case are detailed in a declaration by his attorney. *See* Decl. of Katharine Speer, Esq. (on file with counsel); *see also Nieto Baquera v. Longshore*, No. 1:13-cv-00543-RM-MEH (D. Colo. filed Mar. 1, 2013).

When an immigration judge was finally able to consider Mr. Nieto's evidence at his bond hearing, he granted bond and Mr. Nieto was released back to his family. Nearly a year later, Mr. Nieto won his immigration case, and he subsequently became a U.S. citizen.

The power of bond hearings is also captured in the story of **Saul Marin**,[25] a resident of Washington. Mr. Marin came to the United States in 1988 and has lived here ever since. Over sixteen years ago, Mr. Marin received two convictions for simple drug possession.

Since that time, Mr. Marin rebuilt his life. He started a family and has four U.S. citizen children—two sets of twins, ages seven and nine. In addition to supporting his whole family financially and emotionally, he played a particularly important role in caring for one of his sons who has a learning disability and requires special education programming. While advocating for his son, Mr. Marin joined the board of the Early Childhood Education and Assistance Program in the district where his children were in school. Through this program, he worked closely with other parents and advocated for early childhood education in Olympia, Washington.

Despite the life that Mr. Marin built and the critical role he played for his family and for the community, Mr. Marin was arrested by immigration officers as

---

[25] The facts of Mr. Marin's case are detailed in a declaration of his attorney. *See* Decl. of Robert Pauw, Esq. (on file with counsel); *see also Marin-Salazar v. Asher*, No. C13-96-MJP-BAT, 2013 WL 1499047 (W.D. Wash. Mar. 21, 2013).

he was leaving his home to go to work in September 2012. ICE went to his apartment complex to arrest another person, but then asked Mr. Marin about his immigration status, which Mr. Marin willingly disclosed. Taking him to the Northwest Detention Center, immigration officials refused to set bond on the basis of his drug possession convictions from over a decade prior.

Mr. Marin filed a habeas petition and the court ordered the Government to provide him with a bond hearing. Finally, he and his family were able to provide evidence of the last twelve years of his life and his contributions to his family and community. The immigration judge ordered his release on bond, and Mr. Marin was able to return to his family and his community. Although his case was ultimately resolved favorably, he should never have suffered those seven months of detention after twelve years of rebuilding his life.

When immigration judges are able to exercise their discretion to grant bond if the circumstances warrant it, they fulfill a key judicial function of ensuring that individual liberty is not unduly restrained in the absence of a legitimate government justification. As the stories above illustrate, many immigrants in detention would prevail at a bond hearing—if they were granted one.

This is demonstrated by the available data. In two separate class action lawsuits brought by immigrants subjected to mandatory detention after their release from criminal custody, judges who were given an opportunity to assess the merits of class members' bond

applications found that the immigrant detainee plaintiffs deserved release on bond the majority of the time.[26]

These figures reflect the distressing reality that mandatory detention, irrespective of how much time has elapsed since an immigrant's conviction, routinely ensnares those noncitizens who have the strongest grounds for fighting their deportation and, correspondingly, the most compelling reasons to do so. The figures also demonstrate that a bond hearing, however, is not a guarantee of release. The *Gordon* data, which disaggregated outcomes by the gap in custody, demonstrates that immigration judges are able to account for differences in the passage of time through their bond decisions. Based on the available data, 68% of individuals with a gap of more than five years since their release from criminal custody were granted bond, as compared to only 35% of those with a gap of 90 days or less.[27]

Thus, rather than merely rubber-stamping bond applications, immigration judges with bond authority can carefully consider the facts and circumstances of each individual's case, assessing whether a person's community ties warrant release on bond. By doing so, they can prevent unnecessary detention.

---

[26] *See* Lafaille & Saraswat, *supra* note 11 (reporting that 51% of the hearings ordered through *Gordon* and 86% of the hearings ordered through *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014), *aff'd* 667 F. App'x 966 (9th Cir. 2016), resulted in the grant of bond).

[27] *Id.*

B. Bond hearings prevent immigrants living in the community from suffering arbitrary and punitive detention.

Bond hearings are also critical in ensuring that immigrants who are not flight risks or dangers do not suffer arbitrary and punitive detention. This is made all the more clear by the conditions in which immigrants are held.

Although immigration detention is considered "civil" in nature, the facilities that incarcerate immigrants operate on a penal model. Federal immigration officials incarcerate immigrants in a patchwork of more than 1,000 jails, prisons, and other facilities across the country.[28] Private prison corporations and county correctional departments operate 90% of these facilities, often in remote locations in the country.[29] Oversight is ineffective.[30]

---

[28] NATIONAL IMMIGRANT JUSTICE PROJECT, ICE RELEASED ITS MOST COMPREHENSIVE IMMIGRATION DETENTION DATA YET. IT'S ALARMING, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (analyzing U.S. Immigration and Customs Enforcement data from FY 2018).

[29] *Id.*; *see also* U.S. DEP'T OF HOMELAND SEC., HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf

[30] U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf; DETENTION WATCH NETWORK, ET AL., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT (Feb.

Inside these facilities, immigrants are prisoners. Guards with guns "process" immigrants into these facilities by taking their clothing and belongings and replacing them with a prison jumpsuit.[31] Immigrants are henceforth referred to by an "Alien Number" rather than name, subject to the rules of the facility.

These rules restrict immigrants' liberty in all the ways that free people often take for granted. Access to food, sleep, fresh air, and skylight (if any) is all restricted.[32] Some facilities only permit visitation with family and friends through video.[33] Others permit visitation but only through plexiglass.[34] Some facilities

---

2018), http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf; U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (Dec. 11, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf.

[31] *See, e.g.*, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM–A TWO-YEAR REVIEW (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

[32] *See, e.g.*, DETENTION WATCH NETWORK, EXECUTIVE SUMMARY: EXPOSE AND CLOSE 3 (2012), http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf.

[33] *See, e.g.*, DETENTION WATCH NETWORK, EXPOSE AND CLOSE: BAKER COUNTY JAIL, FLORIDA (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Baker%20County.pdf.

[34] *See, e.g.*, DETENTION WATCH NETWORK, EXPOSE AND CLOSE: STEWART DETENTION CENTER, GEORGIA (Nov. 2012), https://www.

permit "contact visits"—visits where immigrants may see their visitors without a physical barrier—but then subject immigrants who participate in contact visits to strip searches.[35]

Isolated from their families, many immigrants in detention are also subject to forced labor, often at no pay or for a mere $1 per day.[36] Recent federal lawsuits, for example, against GEO Group and CoreCivic (formerly Corrections Corporation of America), allege the forced labor of thousands of immigrants imprisoned in their facilities in Colorado (where **Erick Nieto**, whose story is mentioned above, was held) and Georgia respectively.[37] The money that immigrants make, if any, goes back into the pockets of private prison corporations that charge exorbitant fees for commissary items and phone calls to loved ones.[38]

---

detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Stewart.pdf.

[35] *See, e.g.*, DETENTION WATCH NETWORK, EXPOSE AND CLOSE: HUDSON COUNTY JAIL, NEW JERSEY (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Hudson%20County.pdf.

[36] Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html.

[37] Kieran Nicholson, *Immigrants can sue federal detention center in Colorado over forced labor, appeals court says*, DENVER POST (Feb. 8, 2018), https://www.denverpost.com/2018/02/09/geo-group-aurora-immigration-detention-center-lawsuit/; Esther Yu His Lee, New lawsuit finds detained immigrants are forced to work for $1 a day, ThinkProgress (Apr. 17, 2018), https://thinkprogress.org/stewart-immigrant-forced-labor-9e3c73a88932/.

[38] Lee, *supra* note 37.

Immigrants who step out of line with facility rules are subject to additional punishment, including solitary confinement, as **Astrid Morataya**'s story illustrates above.[39] According to one investigation, on any given day, approximately 300 immigrants are held in solitary confinement at the 50 largest immigration detention facilities.[40] Half were isolated for over two weeks; 1 in 9 was isolated for over two months.[41]

Far too many immigrants in detention are also vulnerable to physical, emotional, and sexual abuse, as **Cynthia Gonzalez**'s story illustrates above.[42] A recent study documented 800 reports of abuse motivated by hate or bias in 34 detention facilities since January

---

[39] NATIONAL IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 17-20 (2012), http://static.prisonpolicy.org/scans/Invisible.pdf; PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM 11-14 (2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf.

[40] Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html.

[41] *Id.*

[42] *See, e.g.*, SOUTHERN POVERTY LAW CENTER ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 14-16 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf; NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 21-23 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf; HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 8-14 (2010), https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf.

20, 2017.[43] Immigration and Customs Enforcement itself received 237 reports of sexual abuse or assault in immigration detention facilities in FY 2017 alone.[44]

The health of immigrants often deteriorates while in detention, yet immigrants are subject to substandard medical care.[45] Since 2003, there have been over 180 reported deaths in immigration detention.[46] A study of recent detention deaths concluded that half were due to inadequate medical care.[47]

In light of the severe deprivation of liberty that detention imposes, a bond hearing cannot be fairly characterized as a "windfall" or "reward" to an immigrant who would otherwise be at liberty. When an immigrant is detained without a bond hearing, no one reviews

---

[43] FREEDOM FOR IMMIGRANTS, PERSECUTED IN U.S. IMMIGRATION DETENTION: A NATIONAL REPORT ON ABUSE MOTIVATED BY HATE (Jun. 25, 2018), https://www.freedomforimmigrants.org/report-on-hate.

[44] *ICE Sexual Abuse Statistics*, THE INTERCEPT (Apr. 11, 2018), https://theintercept.com/document/2018/04/11/ice-sexual-abuse-statistics/.

[45] *See, e.g.*, HUMAN RIGHTS WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf.

[46] DETENTION WATCH NETWORK, REPORTED SUICIDE AT GEORGIA IMMIGRATION DETENTION CENTER (Jul. 12, 2018), https://www.detentionwatchnetwork.org/pressroom/releases/2018/reported-suicide-georgia-immigration-detention-center.

[47] CODE RED, *supra* note 45; Meera Senthilingam, *Half of recent immigrant detainee deaths due to inadequate medical care, report finds*, CNN (Jun. 20, 2018), https://www.cnn.com/2018/06/20/health/immigrant-detainee-deaths-medical-care-bn/index.html.

whether the immigrant's detention—in horrific conditions, separated from family and friends, restricted in every way—serves a non-punitive purpose.

Consider the story of **Arnold Giammarco**.[48] An honorably discharged veteran of the U.S. Army and Connecticut National Guard, Mr. Giammarco lived in the United States for fifty years before federal immigration agents decided to detain him without access to a bond hearing. Although Mr. Giammarco had applied for citizenship when he was serving in the military, no action had been taken on his application. After he left military service, he suffered emotional difficulties leading to drug addiction and ended up with criminal convictions for drug possession and petty theft. But he managed to turn his life around. He overcame addiction and found work, earning several promotions to become a nighttime production manager at McDonald's. He and his partner Sharon married and focused their life on raising their little girl.

In 2011, seven years after Mr. Giammarco's last conviction, federal immigration agents came to his home, ordered him to lie face down on the ground, handcuffed him and took him away from his family. He

---

[48] The facts of Mr. Giammarco's story are detailed in Complaint, *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_giammarco_complaint.pdf. *See also* Decl. of Sharon Giammarco (on file with counsel); *U.S. Army Veteran Returns Home After YLS Clinics Secure Settlement* (Jul. 27, 2017), https://law.yale.edu/yls-today/news/us-army-veteran-returns-home-after-yls-clinics-secure-settlement.

was required to wear a prison uniform, and was shackled during his appearances in court. Held without access to a bond hearing, Mr. Giammarco watched helplessly as his family liquidated their savings fighting his case. In detention, he suffered daily indignities, the worst of which was being physically separated from his family by plexiglass during visitation. Unable to hold his two-year-old daughter, Mr. Giammarco agreed to his own deportation.

In 2017, a federal court recognized that Mr. Giammarco's citizenship application had been valid, and he was finally able to return home to the United States as a U.S. citizen. In the end, his mandatory immigration detention had served no purpose other than to punish Mr. Giammarco, a second time, for old convictions, and separate him from his American family.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences of denying bond hearings to individuals who have lived peaceably in our communities for months and years following a past criminal conviction. Such horrific outcomes are neither required nor permitted

by law. *Amici* respectfully urge this Court to uphold the decision of the Ninth Circuit in this case.

Respectfully submitted,

ALINA DAS
Counsel of Record
JESSICA ROFÉ
WASHINGTON SQUARE
LEGAL SERVICES, INC.
245 Sullivan Street
5th Floor
New York, NY 10012
(212) 998-6430
alina.das@nyu.edu

Counsel for Amici Curiae

August 2018

No. 16-1363

IN THE
Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

v.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF U.S. REPS. ANDY BIGGS, DAVE BRAT, SCOTT DESJARLAIS, PAUL GOSAR, ANDY HARRIS, JODY HICE, WALTER JONES, STEVE KING, DOUG LAMALFA, AND TED YOHO, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: June 8, 2018

QUESTIONS PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into criminal custody immediately.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. SECTION 1226(C) IMPOSES MANDATORY DETENTION ON ALIENS WHO ARE REMOVABLE FOR ANY OF THE REASONS SPECIFIED IN THE STATUTE 10

A. Congress Cut Back on Immigration Officers' Broad Discretion to Detain or Release Criminal Aliens 10

B. Section 1226(c)(1) Directs Immigration Officers to Take Custody of Criminal Aliens as Soon as They Are Released from Criminal Custody 13

C. The Mandatory Nature of Detention Provided for in Section 1226(c) Does not Dissipate if Immigration Officials Delay Taking Criminal Aliens into Custody 15

Page

D. The Aliens "Described" in Section 1226(c)(1)—and Thereby Made Subject to Mandatory Detention—Are Those Specified in Subparagraphs (A) through (D) 20

II. THE LEGISLATIVE HISTORY OF SECTION 1226(C) CONFIRMS THAT CRIMINAL ALIENS DO NOT GAIN EXEMPTION FROM MANDATORY DETENTION IF THEY ARE NOT TAKEN INTO CUSTODY IMMEDIATELY 24

III. THE COURT SHOULD DIRECT DECERTIFICATION OF THE PLAINTIFF CLASSES WHEN THE CASE IS REMANDED FOR CONSIDERATION OF RESPONDENTS' DUE PROCESS CLAIMS 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases:

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 7, 16
Brock v. Pierce County,
476 U.S. 253 (1986) 17
Demore v. Kim,
538 U.S. 510 (2003). 9, 18, 24, 25, 26, 27
Hosh v. Lucero,
680 F.3d 375 (4th Cir. 2012) 7, 14
In re Rojas,
23 I & N. Dec. 117
(B.I.A. 2001) (*en banc*) 11, 19, 28
INS v. St. Cyr,
533 U.S. 289 (2001) 2
Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 1, 10, 21, 30 31, 32
Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010), *rev'd on other grounds sub nom., Jennings v. Rodriguez*,
138 S. Ct. 830 (2018) 30
Sylvain v. Attorney General,
714 F.3d 150 (3d Cir. 2013) 7, 13, 18
United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 16
United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 16, 17, 18, 19

Page(s)

Statutes an Constitutional Provisions:

U.S. Const. Amend. V (Due Process Clause) 6

Bail Reform Act of 1984 ..... 16, 17, 18, 19
18 U.S.C. § 3142(f) 16

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. ..... 2, 9, 27, 29
IIRIRA § 304(b) 2

Immigration and Naturalization Act of 1952 (INA) 2, 28
INA § 212(c) (1995) 2
INA § 242(a)(2) (1995) 28
8 U.S.C. § 1221 - 1231 29
8 U.S.C. § 1226 ..... 9, 11, 29
8 U.S.C. § 1226(a) 5, 6, 11, 12
8 U.S.C. § 1226(c) ..... *passim*
8 U.S.C. § 1226(c)(1) ..... *passim*
8 U.S.C. § 1226(c)(1)(A) - (D) 4, 8, 21, 22
8 U.S.C. § 1226(c)(2) ..... *passim*
8 U.S.C. § 1252(f)(1) 10, 29, 30

Rules and Regulations:

8 C.F.R. § 1236.1(c)(8) 5, 12

Fed. R. Civ. P. 23(a) 31

Fed. R. Civ. P. 23(b)(2) 9

Page(s)

Miscellaneous:

Dependent Clauses: Adverbial, Adjectival, Nominal, TOWSON ONLINE WRITING SUPPORT (*"Dependent Clauses"*), https://webapps.Towson.edu/ows/AdvAdjNomClause.htm (last visited June 8, 2018) 23, 24

Identifying Independent and Dependent Clauses, PURDUE ONLINE WRITING LAB, https://English.purdue.edu/owl/resources/598/1 (last visited June 8, 2018) 23

John Morton, Director, Immigration and Customs Enforcement Agency, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) 19

William Strunk Jr. & E.B. White, THE ELEMENTS OF STYLE (4th ed. 2000) 23

Webster's Third International Dictionary (2002) .. 14

H.R. Conf. Rep. No. 104-828 (1996) 27

S. Rep. No. 104-249 (1996) 27

S. Rep. No. 104-48 (1995) 27

141 Cong. Rec. S7803, S7823 (June 7, 1995) 27

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are ten Members of Congress and a public-interest law firm.[1]

Amici curiae Andy Biggs (Ariz.), Dave Brat (Va.), Scott DesJarlais (Tenn.), Paul Gosar (Ariz.), Andy Harris (Md.), Jody Hice (Ga.), Walter Jones (N.C.), Steve King (Iowa), Doug LaMalfa (Calif.), and Ted Yoho (Fla.) are Members of the U.S. House of Representatives.

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF regularly appears in this and other federal courts to support the rule of law in immigration proceedings. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Amici believe that Congress and the Executive Branch must continue to be afforded broad power to detain, pending completion of removal proceedings, those aliens who have been convicted of serious crimes. Experience has demonstrated that if those aliens are not detained, a large percentage of them will abscond, and a significant majority will commit new crimes before they can be apprehended and their removal proceedings completed.

Congress concluded in 1996 that the immigration laws then in effect granted the Executive

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

Branch too much discretion to release criminal aliens facing deportation. Accordingly, it amended immigration law to require detention—pending completion of removal proceedings—of all aliens convicted of serious crimes. *Amici* are concerned that the decision below severely undercuts the mandatory-detention provision. By limiting mandatory detention to those criminal aliens who are taken into federal custody *immediately* following their release from criminal incarceration, the decision below ensures that large numbers of criminals will once again be set free within the general population while their appeals from removal orders are pending. *Amici* do not believe that the immigration laws require that irrational result.

STATEMENT OF THE CASE

Most aliens who are subject to removal proceedings are permitted to live freely in American society while those proceedings are ongoing. Congress has, however, designated one instance in which such aliens "shall" be detained pending completion of those proceedings. In 1996, Congress enacted 8 U.S.C. § 1226(c) to require the detention, pending completion of removal proceedings, of aliens who have been convicted of certain serious crimes specified in the statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208.[2]

---

[2] Congress, in IIRIRA and related legislation, further provided that removal is absolutely mandatory for aliens convicted of particularly serious crimes. IIRIRA eliminated the Secretary's discretion to waive deportation for such aliens. IIRIRA § 304(b) (repealing § 212(c) of the Immigration and Naturalization Act of 1952 (INA)). *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

Federal immigration officials detained three of the Respondents (the "Preap Respondents") in California pursuant to § 1226(c), pending completion of removal proceedings. The other three Respondents (the "Khoury Respondents") were similarly detained in the State of Washington. Each of the Respondents had been convicted of one or more serious crimes, and each concedes (at least for purposes of this case) that his criminal record rendered him removable as well as subject to mandatory detention under § 1226(c). However, the Immigration and Customs Enforcement Agency (ICE) allowed some time to elapse following Respondents' release from criminal custody (periods ranging from several months to 11 years) before initiating removal proceedings and taking them into custody.

Respondents contend that § 1226(c)'s mandatory detention provisions do not apply to them because they were not detained immediately following their release from imprisonment for one of the offenses listed in § 1226(c). In other words, they admit that ICE could have subjected them to mandatory detention if it had acted more diligently but that § 1226(c) detention was no longer permissible once ICE delayed in taking them into custody. Instead, Respondents argue, they are entitled to a bond hearing and to release from custody in the absence of evidence that they are flight risks or a danger to public safety.

Federal district courts in Oakland and Seattle agreed with those arguments. The Oakland court granted a preliminary injunction to the Preap Respondents and a class of similarly situated criminal aliens, finding that the Government violates "the plain

language of Section 1226(c)" by subjecting to mandatory detention those aliens who have committed an offense enumerated in § 1226(c) but who were not apprehended at the time they were released from criminal custody. Pet. App. 60a-106a. The Seattle court issued the following declaratory judgment in favor of the Khoury Respondents and a class of similarly situated criminal aliens: "The government may not subject an alien to mandatory detention via 8 U.S.C. § 1226(c) unless the government took the alien into custody immediately upon his release from custody for an offense described in subparagraphs (1)(A) through (1)(D) of § 1226(c)." *Id.* at 137a.

In a published opinion, the Ninth Circuit affirmed the preliminary injunction awarded to the Preap Respondents. Pet. App. 1a-28a. The appeals court recognized that its interpretation of § 1226(c) conflicts with the interpretation of every other federal appeals court that has issued an opinion addressing the issue—the Second, Third, Fourth, and Tenth Circuits. *Id.* at 4a-5a. Relying on its *Preap* decision, the court issued a brief unpublished Memorandum affirming the Seattle court's judgment that granted class certification and declaratory judgment to the Khoury Respondents. *Id.* at 58a-59a.

The Ninth Circuit noted that § 1226(c)(1) states that "any alien" who is inadmissible or deportable by virtue of having committed certain enumerated crimes "shall" be taken into custody by immigration officials "when the alien is released ..." The appeals court held, "The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the AG into immigration custody 'when [they are]

released' from criminal custody." Pet. App. 5a-6a. It concluded that "Congress's use of the word 'when' conveys immediacy" and that the statute deprives immigration officials of mandatory-detention authority if they fail to detain criminal aliens "promptly upon the aliens' release from criminal custody." *Id.* at 6a.

The appeals court described § 1226(c) as a "limited exception" to 8 U.S.C. § 1226(a), which grants immigration authorities discretion *either* to continue to detain an alien arrested as potentially removable *or* to release the alien on bond. *Id.* at 10a.[3] The court noted that the Government, pursuant to its § 1226(a) discretionary release authority, has issued regulations granting detained aliens a right to a bond hearing and providing that an alien may be released if he is found to be neither a danger to the community nor a flight risk. *Id.* (citing 8 C.F.R. § 1236.1(c)(8)).

In support of its interpretation of the mandatory detention statute, the Ninth Circuit cited language in § 1226(c)(2)—a provision that prohibits the Government (except in circumstances inapplicable here) from releasing "an alien described in paragraph (1)." The court concluded that the aliens "described in paragraph (1)" include only those aliens who are taken into immigration custody immediately following their release from criminal custody. Pet. App. 13a-19a.

Finally, the appeals court rejected the

---

[3] Sections 1226(a) and 1226(c) reference the detention authority of "the Attorney General," but that authority is now shared by the Secretary of Homeland Security and her designate, ICE.

Government's argument that "even if § 1226(c)(1) requires prompt detention, we should nonetheless uphold the AG's authority to detain without bond an alien who committed a covered offense even when the AG has violated the mandate of § 1226(c)(1)." *Id.* at 23a. The Government's argument relied on Court decisions holding that statutes stating that the Government "shall" act within a specified time should not be construed, without more, as stripping the Government of authority to act at a later time. *Id.* The Ninth Circuit held that this line of cases was inapplicable because its interpretation of § 1226(c) did not deprive immigration officials of all authority to detain criminal aliens who are not taken into custody in a timely manner; rather, its interpretation simply requires that detention decisions be governed by § 1226(a) rather than § 1226(c). *Id.* at 25a-26a.

Respondents also asserted that the Government's denial of bond hearings violated their Fifth Amendment rights to due process of law. Both the district courts and the Ninth Circuit ruled in Respondents' favor without addressing the due process issue.

SUMMARY OF ARGUMENT

The Ninth Circuit's construction of § 1226(c) is inconsistent with the language, structure, purpose, and history of that statute. The only plausible interpretation of the statute is that it eliminates the discretion that immigration officials previously possessed to release on bond (pending completion of removal proceedings) those aliens convicted of particularly serious crimes. Congress directed that

aliens subject to mandatory detention should be taken into custody just as soon as they are released from criminal custody. But nothing in the statute suggests that Congress intended to "reward" immigration officials by restoring their discretionary release authority in those instances in which officials fail to immediately detain the criminal aliens.

Paragraph 1226(c)(1) states that immigration officials "shall" take criminal aliens into custody "when the alien is released" from criminal custody. As the Fourth Circuit has recognized, the "when ... released" language "connotes some degree of immediacy," *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012)—Congress certainly was not suggesting that immigration officials were free to act at their leisure. But the statute includes no language suggesting that the obligation to take a criminal alien into custody dissipates once immigration officials have failed to take custody as soon as he is released from criminal custody.

Indeed, this Court has repeatedly held that federal statutes stating that the Executive Branch "shall" take action by a specified date should not be interpreted as a prohibition against taking that action after the specified date. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003). The Third Circuit rejected the interpretation of § 1226(c)'s "when ... released" language adopted by the courts below, explaining, "Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches to avoid their obligations just by dragging their feet." *Sylvain v. Attorney General*, 714 F.3d 150, 158 (3d Cir. 2013)

(citations omitted).

There is no plausible argument that Congress inserted the "when ... released" language for the benefit of criminal aliens; to the contrary, they benefit when ICE *delays* in taking them into ICE custody following their release from criminal custody. Congress adopted language connoting a need for immediate action because it believed that the public interest would be well served if criminal aliens were kept off the streets throughout the period during which their removal proceedings were pending. That public interest is furthered even when ICE officials neglect to take immediate action and take a criminal alien into custody only after he has regained his freedom.

The Ninth Circuit's reliance on § 1226(c)(2)'s "alien described in paragraph (1)" language is misplaced. The only language in § 1226(c)(1) that "describes" an alien is the language set out in subparagraphs (A) through (D)—the provisions that identify the categories of aliens who are eligible for § 1226(c) detention. Paragraph (1)'s "when ... released" language does not "describe" an alien; rather, it addresses the timing of the Attorney General's decision to take an identified alien into custody; *e.g.*, the Attorney General is not to take the alien into custody *before* he has been released from criminal custody. That understanding of the word "described" is dictated by the structure and history of § 1226(c) as well as by well-accepted rules of English grammar. The phrase "when the alien is released" is an adverbial phrase that cannot modify a noun (*i.e.* the noun "alien" in the opening clause of paragraph (1)) and thus cannot be said to "describe" an alien within the meaning of

§ 1226(c)(2).

Section 1226(c)'s legislative history strongly supports the Government's position that the statute's mandatory-detention requirement remains in force even if ICE fails to take custody of a criminal alien immediately after his release from criminal custody. As the Court recognized in *Demore v. Kim*, 538 U.S. 510, 519 (2003), Congress adopted § 1226(c) in light of "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during deportation proceedings." IIRIRA included a mandatory-detention provision because Congress wanted to prevent "deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Congress's concern was with expediting the removal of *all* aliens who committed serious crimes, not simply the removal of those criminal aliens who are taken into custody immediately.

Respondents also raise a due-process challenge to the Government's refusal to provide them with bond hearings. The lower courts declined to reach that issue because they interpreted § 1226 as requiring the provision of bond hearings to Respondents. The Court should reverse that statutory ruling and then remand the case to permit the lower courts to address the due process claims in the first instance. As it did in *Jennings*, the Court should direct the lower courts on remand to reconsider their Rule 23(b)(2) class-certification orders. Congress has eliminated the jurisdiction of federal courts to hear challenges to the

operation of § 1226(c) on a class-wide basis. 8 U.S.C. § 1252(f)(1). If one of the Respondents can demonstrate on an individualized basis that his detention without access to a bond hearing violates his due-process rights, federal courts possess jurisdiction to grant appropriate relief. But particularly because a due-process claim is plaintiff-specific and "calls for such procedural protections as the particular situation demands," the lower courts lack both jurisdiction and a plausible rationale for continuing to hear the claims of Respondents and similarly situated criminal aliens on a class-wide basis. *Jennings*, 138 S. Ct. at 851-52.

ARGUMENT

I. SECTION 1226(C) IMPOSES MANDATORY DETENTION ON ALIENS WHO ARE REMOVABLE FOR ANY OF THE REASONS SPECIFIED IN THE STATUTE

A. Congress Cut Back on Immigration Officers' Broad Discretion to Detain or Release Criminal Aliens

Prior to the mid-1980s, immigration law granted Executive Branch officials very broad discretion over whether to hold aliens in custody pending completion of deportation proceedings. Starting in 1988, Congress passed a series of laws cutting back on that discretion and mandating that certain categories of criminal aliens were not to be released from custody during the pendency of deportation proceedings. Congress's apparent purpose was to ensure that criminal aliens could be located on the day appointed for their deportation. *See In re Rojas*, 23 I. & N. Dec. 117, 121-

24 (B.I.A. 2001) (*en banc*).

That effort culminated in the adoption of 8 U.S.C. § 1226(c) as part of IIRIRA; it mandates arrest and detention throughout removal proceedings of large numbers of criminal and terrorist aliens who are either deportable or inadmissible under specified sections of the immigration laws. As the Court explained in *Jennings*:

> Section 1226 generally governs the process of arresting and detaining [inadmissible aliens or aliens convicted of criminal offenses] pending their removal. ... Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States." § 1226(a). "Except as provided in subsection (c) of this section," the Attorney General "may release" an alien detained under § 1226(a) "on bond ... or conditional parole." *Ibid.* Section 1226(c), however, carves out a statutory category of aliens who may *not* be released under § 1226(a).

138 S. Ct. at 837.

The Ninth Circuit interpreted § 1226(c) as the grant of a new, special authority to detain aliens. Pet. App. 15a (characterizing § 1226(c) as a "limited exception" to § 1226(a) that grants immigration officials new detention authority not previously

available). As the history of immigration law described above makes clear, the Ninth Circuit had it exactly backward. Prior to 1996, immigration officials possessed broad authority to take deportable aliens into custody, as well as broad discretion (subject to judicial review for abuse of discretion) to determine whether to continue the detention or to release the aliens on bond. Far from granting immigration officials new powers, § 1226(c) cut back on their powers by curtailing their release authority. Section 1226(c) states that the Attorney General "shall" take specified aliens into custody and expressly prohibits their release prior to removal except in circumstances inapplicable here.

The Ninth Circuit's ruling effectively grants immigration officials the power to nullify § 1226(c) and reclaim for themselves their previous discretionary authority to detain or release criminal aliens. According to the appeals court, if immigration officials delay only slightly and take a criminal alien into custody sometime after his release from criminal custody, release procedures become subject to § 1226(a)—the statute that historically has accorded them broad discretion in deciding whether to release the alien.[4] It is not plausible that Congress intended to permit its new limitations on Executive Branch

---

[4] ICE regulations provide that immigration officials generally will exercise their § 1226(a) release authority upon a determination that the alien does not pose a danger to persons or property and is likely to appear for any future proceeding. 8 C.F.R. § 1236.1(c)(8). Congress has not directed adoption of those release criteria; it has granted immigration officials very broad discretion in determining § 1226(a) release criteria.

authority to be so easily sidestepped. Although § 1226(c) directs Executive Branch officials to act quickly, such directives are designed to "prod [other branches of government] into ensuring the timely completion of their statutory obligations to the public, not to allow those branches to avoid their obligations just by dragging their feet." *Sylvain*, 714 F.3d at 158.

B. Section 1226(c)(1) Directs Immigration Officers to Take Custody of Criminal Aliens as Soon as They Are Released from Criminal Custody

Section 1226(c) is divided into two paragraphs. Paragraph 1 (that is, § 1226(c)(1)) imposes on immigration officials an obligation to take into custody the criminal and terrorist aliens specified therein. Paragraph 2 addresses the release of those detained pursuant to Paragraph 1; it states that release is permissible "only" under circumstances inapplicable to this case.

Section 1226(c)(1) states, "The Attorney General shall take into custody any alien who [is inadmissible or deportable by reason of having committed one of several enumerated offenses] when the alien is released..." The parties dispute the meaning of the phrase "when the alien is released..."[5]

---

[5] Several aspects of the phrase's meaning are not disputed. Although § 1226(c)(1) does not elaborate on the meaning of the word "released," all parties agree that it refers to release from a custodial sentence imposed for violating one of the enumerated offenses. They also agree that the Attorney General's obligation to

The phrase "when the alien is released" modifies the verb phrase "take into custody." Respondents contend (and the Ninth Circuit agreed) that "when the alien is released" specifies that immigration officials are only permitted to undertake their § 1226(c)(1) take-into-custody obligations at *the precise time* that the alien is released from criminal custody. Pet. App. 19a-27a.

Conversely, the United States contends that the word "when" has multiple meanings and does not necessarily connote a need for immediate action:

> Th[e "when ... released"] clause standing alone could be read to mean either "at or during the time that" ("while") the alien is released, or "just after the moment that" he is released.

Pet. Br. 17 (quoting *Webster's Third New International Dictionary* 2602 (2002)).

Amici agree with the Fourth Circuit that § 1226(c)(1)'s "when ... released" language "connotes some degree of immediacy." *Hosh*, 680 F.3d at 381. Congress adopted § 1226(c) because it sought to light a fire under immigration officials, whom it deemed to have taken insufficient steps to remove criminal aliens from the Nation. The statute states that the Attorney General "shall" take specified criminal aliens into custody "when the alien is released." That language does not suggest that immigration officials are free to

---

take custody does not arise while the criminal alien is still serving his custodial sentence.

act at their leisure.[6]

Importantly, however, nothing in the statute suggests that the statutory obligation to take the specified aliens into custody dissipates once immigration officials have failed to take custody as soon as the aliens are released from criminal custody. As noted above, the statute does not confer new arrest powers on immigration officials. Rather, the statute imposes on the Attorney General *obligations* that should be undertaken in a timely manner but says nothing to suggest that the obligations are time-limited.

C. The Mandatory Nature of Detention Provided for in Section 1226(c) Does not Dissipate if Immigration Officials Delay Taking Criminal Aliens into Custody

Although § 1226(c)(1)'s "when ... released" provision connotes a mandate that immigration authorities proceed expeditiously in detaining criminal aliens following their release from criminal custody,

---

[6] The final clauses of § 1226(c)(1) reinforce the understanding that Congress expected the Attorney General to Act just as soon as the criminal alien is released from prison-style custody. Immediately following the "when the alien is released" language, the statute provides that the obligation to take the criminal alien into custody exists "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." In other words, Congress declared that it would brook no excuses for delay by immigration officials in taking criminal aliens into custody.

the statute does not state that the Attorney General may take custody under § 1226(c)(1) *only* at the precise moment of release. But even if the statute could plausibly be construed as imposing an immediate-custody requirement, a criminal alien who is not detained until after his release does not thereby become exempt from mandatory detention. As this Court explained in *Barnhart*, "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart*, 537 U.S. at 161. In general, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (citations omitted).

The Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), is directly on point and requires a finding that § 1226(c)'s detention mandate does not dissipate simply because immigration officials delay in carrying out the mandate. In *Montalvo-Murillo*, a criminal suspect sought and obtained pre-trial release because judicial officers failed to comply with time limitations imposed by the Bail Reform Act of 1984.[7] The Court reversed,

---

[7] The Act states that a pretrial detention hearing "shall be held immediately upon the [criminal suspect's] first appearance before the judicial officer" and permits a continuance of the hearing of no more than five days. 18 U.S.C. § 3142(f). The suspect's hearing did not occur until 11 days after his first appearance, and the Government made no showing of good cause for the delay. The district court held that although the

holding that the Government's failure to conduct a detention hearing within the time frame imposed by the Act did not preclude it from detaining the suspect in advance of trial. 495 U.S. at 717.

The Court explained:

> There is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent. ... "We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."

Id. at 717-18 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)).

The Ninth Circuit sought to distinguish *Montalvo-Murillo*, noting that, unlike the lower-court decisions in that case, its decision does not altogether preclude the Government from detaining individuals if ICE fails to comply with statutory time limits. If immigration officials delay in taking custody of a

---

Government demonstrated that no conditions of release could reasonably assure either the suspect's appearance at trial or public safety (findings that ordinarily would mandate pretrial detention), the Government's failure to comply with the statutory time limit for conducting a detention hearing precluded the suspect's continued detention. 495 U.S. at 714-16.

criminal alien, they can still detain him throughout removal proceedings if an immigration judge determines at a bail hearing that the alien is either a flight risk or a danger to the public. Pet. App. 26a.

That purported distinction between this case and *Montalvo-Murillo* is not meaningful; in both cases, the detention rules sought to be imposed by the lower courts were not the ones adopted by Congress. When it enacted § 1226(c), Congress determined that aliens subject to removal for criminal activity should be detained throughout the removal process. As *Demore* and *Sylvain* explained, Congress determined that their criminal backgrounds should serve as a proxy for flight risk and danger to the public. *Demore*, 53 U.S. at 528; *Sylvain*, 714 F.3d at 160. *Montalvo-Murillo* is not distinguishable simply because the alternative detention rules imposed by the Ninth Circuit arguably thwart the congressional mandate to a lesser degree than did the lower court decisions in *Montalvo-Murillo*.

Indeed, the argument for interpreting a statute's timely-government-action requirement as a prohibition against tardy government action is far weaker here than it was in *Montalvo-Murillo*. The Bail Reform Act's timely-detention-hearing requirement was adopted at least in part for the benefit of criminal suspects, who have a strong interest in a timely hearing that may result in an early release.

In contrast, no one seriously contends that Congress adopted the § 1226(c) detention mandate for the benefit of criminal aliens. To the contrary, criminal aliens only stand to benefit when ICE delays in taking them into custody following their release

from criminal detention; they would be quite happy if ICE forgot about them indefinitely. *Montalvo-Murillo* observed that "there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of [the Bail Reform Act] occurs." 495 U.S. at 720. That admonition against bestowing a "windfall" on detainees is doubly applicable here, where the alleged untimeliness of government action has only served to benefit criminal aliens facing removal proceedings.

Congress adopted § 1226(c) because of its interest in detaining and removing *all* criminal aliens, not simply those aliens who come into ICE custody at the time they are released from criminal custody. *Rojas*, 23 I. & N. Dec. at 122.[8] It would be inconsistent with that goal to interpret § 1226(c)'s detention mandate as inapplicable to criminal aliens who, for whatever reason, are not detained at the precise moment they are released from criminal custody.

---

[8] Indeed, all recent Administrations have made the detention and removal of criminal aliens their highest immigration enforcement priority. For example, during the Obama Administration, a 2011 memorandum from the director of ICE stated that the agency's first priority was "[a]liens who pose ... a risk to public safety" and directed the agency to use "detention resources" for "aliens subject to detention by law." John Morton, Director, Immigration and Customs Enforcement Agency, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* at 1, 3 (March 2, 2011).

D. The Aliens "Described" in Section 1226(c)(1)—and Thereby Made Subject to Mandatory Detention—Are Those Specified in Subparagraphs (A) through (D)

In concluding that § 1226(c) is inapplicable to criminal aliens who are not taken into ICE custody immediately following their release from criminal custody, the Ninth Circuit relied heavily on the first clause of § 1226(c)(2): "The Attorney General may release an alien described in [§ 1226(c)(1)] only if ..." The Ninth Circuit held that the only aliens "described" in § 1226(c)(1) are those who have committed one of the predicate crimes *and* who were taken into ICE custody when they were released from criminal detention. Pet. App. 13a-19a. Because Respondents and similarly situated criminal aliens (none of whom were taken into custody until some time after their release from criminal detention) are not "described" in § 1226(c)(1), they are not subject to § 1226(c)(2)'s no-release mandate, the Ninth Circuit held. *Ibid.*

The appeals court's reliance on the "alien described" language is misplaced because the clause within § 1226(c)(1) on which the court focuses—"when the alien is released"—is not descriptive of anyone. Instead, it is an adverbial clause that tells immigration officials *when* they are to take custody of certain aliens: they are to "take into custody any alien [who is removable or inadmissible by reason of having committed specified offenses] when the alien is released." 8 U.S.C. § 1226(c)(1). Indeed, the statute's reference to "the" alien is an indication that those who are to be taken into custody expeditiously have been

fully described elsewhere. There is little doubt which aliens are "described" in the statute; §§ 1226(c)(1)(A) - (D) identify the categories of aliens who are eligible for § 1226(c) mandatory detention and "shall" be taken into custody.

Any doubt on that score is eliminated by the structure of the statute. Section 1226(c)(1) begins by stating, "The Attorney General shall take into custody any alien who— ..." and then is followed by the four indented subparagraphs ((A) through (D)) that state precisely "who" the aliens are that are to be taken into custody. Indeed, *dicta* in *Jennings* stated (without challenge from dissenting justices) that those subject to mandatory detention under § 1226(c)(2) include *all* aliens described in subparagraphs (A) through (D), without reference to how quickly they were taken into ICE custody:

> Section 1226(c) ... states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. 8 U.S.C. § 1226(c)(1). Section 1226(c) then goes on to specify that the Attorney General "may release" one of those aliens *"only if* the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger of flight risk. § 1226(c)(2) (emphasis added).

Jennings, 138 S. Ct. at 846.

The final clauses of § 1226(c)(1) reinforce the conclusion that the "when the alien is released" clause was not intended to restrict the universe of criminal aliens subject to mandatory detention under § 1226(c)(2). As described in more detail in Footnote 6 above, those concluding clauses (which appear immediately following the "when the alien is released" clause) emphasize that the Attorney General's duty to take criminal aliens into custody is not affected by the character of the alien's release from criminal detention or the possibility that he may be rearrested on criminal charges. In other words, all of the clauses that follow subparagraphs (A) through (D) in § 1226(c)(1)—including the "when the alien is released" clause—focus on the timing of the arrest of aliens, as opposed to describing *which* aliens are subject to § 1226(c) mandatory detention.

Had Congress intended to limit the aliens "described" in § 1226(c)(1) to those taken into ICE custody immediately following their release from criminal incarceration, it likely would have drafted legislation along the following lines: "The Attorney General shall take into custody any alien who is scheduled to be released from criminal incarceration and who is removable or inadmissible by reason of having committed one of the following specified offenses." In contrast, in the statute as actually written, the phrase "when the alien is released" modifies the verb phrase "shall take into custody," not the noun "alien"—and thus does not impose additional limits on the number of criminal aliens otherwise subject to mandatory detention.

The Government's understanding of which aliens

are "described" in § 1226(c)(1) is also supported by well-accepted rules of English grammar. As a grammatical construction, the phrase "when the alien is released" is a dependent adverbial clause.[9] The appearance of the word "when" at the beginning of the clause is the cue that identifies the dependent clause as adverbial; an adverbial clause describes a verb in a sentence's main clause and answers the questions *when, why, where, how,* or *to what degree. Dependent Clauses: Adverbial, Adjectival, Nominal,* TOWSON ONLINE WRITING SUPPORT ("*Dependent Clauses*"), https://webapps.towson.edu/ows/AdvAdjNomClause.htm (last visited June 8, 2018).[10]

The verb in question is "take into custody." It is the verb in the "main clause" on which "when the alien is released" is dependent. Accordingly, under well-accepted rules of grammar, "when the alien is released" modifies the verb phrase "take into custody" and describes the time frame when the Attorney General's obligation to act arises. "When the alien is released," as a dependent *adverbial* phrase, cannot modify either of the nouns in the main clause ("Attorney General" and "alien") and thus cannot be said to "describe" the

---

[9] A clause is "dependent" when (as here) it cannot be a complete sentence; it contains both a subject and a verb but does not express a complete thought. *Identifying Independent and Dependent Clauses*, PURDUE ONLINE WRITING LAB, https://owl.english.purdue.edu/owl/resource/598/1 (last visited June 8, 2018).

[10] To refer to a dependent clause as "adverbial" means that it serves as an adverb—it modifies a verb, an adjective, or another adverb. William Strunk Jr. & E.B. White, THE ELEMENTS OF STYLE 89 (4th ed. 2000).

aliens subject to mandatory detention.[11]

In sum, because § 1226(c)(1) does not "describe" any aliens based on the dates on which they were released from criminal incarceration and taken into custody by immigration officials, § 1226(c)(2)'s reference to "the aliens described in [§ 1226(c)(1)]" does not limit its do-not-release mandate to those criminal aliens taken into custody immediately following their release from criminal incarceration.

II. THE LEGISLATIVE HISTORY OF SECTION 1226(C) CONFIRMS THAT CRIMINAL ALIENS DO NOT GAIN EXEMPTION FROM MANDATORY DETENTION IF THEY ARE NOT TAKEN INTO CUSTODY IMMEDIATELY

The Court's decision in *Demore* includes a lengthy discussion of the legislative history that led to adoption of § 1226(c) in 1996. That history confirms that Congress did not intend to make the mandatory detention of a criminal alien dependent on his being taken into ICE custody immediately following his release from criminal detention.

As *Demore* recognized, "Congress adopted [§ 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. Despite those increases, "Congress's investigations showed ...

---

[11] A dependent clause could modify a noun, such as the word "alien" in the main clause, only if it were adjectival in nature. Dependent adjectival clauses are typically begun by the relative pronoun "who." *See Dependent Clauses*, *supra*.

that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." *Id.* (emphasis in original). Among the costs identified by Congress of failing to deport criminal aliens in a timely manner was that

> deportable criminal aliens who remain in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began.

Id. (citations omitted).

Congress was also responding to "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 519. While improved flight-risk screening at bond hearings arguably could have reduced the large numbers of deportable criminal aliens failing to appear at their removal hearings, studies available to Congress "strongly support[ed] Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id.* at 520. Studies presented to Congress "suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country." *Id.* at 521.

Congress adopted § 1226(c) in response to that evidence. *Demore* rejected a due-process challenge to § 1226(c)'s mandatory detention provisions filed by a criminal alien who claimed that Congress had insufficient evidence to support its conclusion that improved bond-hearing screening would be inadequate to reduce recidivism and flight by those released pending completion of removal proceedings. *Id.* at 528.[12] The Court held that Congress acted constitutionally when it instituted mandatory detention in response to the evidence cited above:

> Congress had before it evidence that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable aliens skipping their hearings and remaining at large in the United States unlawfully. ... The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.

Id.

---

[12] The inadequacy of bond-hearing screening is borne out by the facts of this case. Alvin Rodriguez Moya, one of the Khoury Respondents, was granted a bond hearing pursuant to Ninth Circuit orders, and he was released from custody pending completion of removal proceedings, after an immigration judge's determination that he was neither a flight risk nor a threat to public safety. Pet. App. 109a. Moya was later rearrested on murder charges, and a jury in 2017 found him guilty of the attempted first degree murder of his ex-girlfriend and the first-degree murder of her new boyfriend. *See* Pet. Br. at 7 n.3.

Totally absent from the legislative history surveyed by *Demore* is any indication that Congress sought to limit § 1226(c) mandatory detention to those criminal aliens whom immigration authorities took into custody immediately following their release from criminal detention. To the contrary, that history demonstrates Congress's focus on expediting the removal of *all* criminal aliens, not simply of those who were never set free following completion of their criminal sentences.[13] The Ninth Circuit's decision ascribes a meaning to § 1226(c) completely at odds with that broader congressional focus.

Moreover, a series of federal statutes adopted in the years preceding 1996 mandated detention-pending-removal for specified categories of criminal aliens, and those statutes made clear that the detention mandate applied without regard to the date on which the criminal alien was taken into custody by immigration

---

[13] Numerous statements in House and Senate reports issued in connection with the adoption of IIRIRA and § 1226(c) confirm *Demore*'s understanding of Congress's rationale for adopting the legislation. *See, e.g.*, S. Rep. No. 104-48, at 1-3, 23, 31-32 (1995) (recommending enhanced detention-pending-removal requirements as an effective means of expediting removal of criminal aliens); S. Rep. No. 104-249, at 2 (1996) (stating that the purpose of IIRIRA was "the removal of excludable and deportable aliens, especially criminal aliens"); H.R. Conf. Rep. No. 104-828, at 210-11 (1996) (stating that § 1226(c) "provides that the Attorney General *must* detain an alien who is inadmissible ... or deportable under" specified sections of the INA) (emphasis added). *See also* 141 Cong. Rec. S7803, S7823 (June 7, 1995) (statement of Sen. Abraham) (supporting mandatory detention of *all* criminal aliens as necessary to ensure their presence at removal proceedings).

officials.[14] In light of those previous statutes, it is highly unlikely that Congress intended to switch gears in 1996 and adopt a mandatory-detention statute that applied only to criminal aliens who were taken into custody immediately following their release from criminal detention.

---

[14] For example, as amended by Congress in 1991, § 242(a)(2) of the INA, provided as follows:

> (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.
>
> (B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

That language has only one plausible interpretation: an alien who has committed an aggravated felony is categorically ineligible for release on bond, without regard to the timing of his detention, if he has not been lawfully admitted into the United States. *See also*, *Rojas*, 23 I. & N. Dec. at 122-124.

III. THE COURT SHOULD DIRECT DECERTIFICATION OF THE PLAINTIFF CLASSES WHEN THE CASE IS REMANDED FOR CONSIDERATION OF RESPONDENTS' DUE PROCESS CLAIMS

Congress has significantly restricted the jurisdiction of federal courts over immigration matters. In awarding injunctive relief on a class-wide basis against federal immigration officials, the lower courts may well have exceeded their jurisdiction. On any remand from this Court for consideration of constitutional issues not yet addressed by the courts below, the Court should direct decertification of the plaintiff classes.

A jurisdiction-limiting provision of IIRIRA, 8 U.S.C. § 1252(f)(1), entitled "Limits on Injunctive Relief," states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no Court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of [8 U.S.C. § 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

The last clause of § 1252(f)(1) prohibited the Ninth Circuit from issuing class-wide injunctive relief with respect to detentions under § 1226. That clause limited the Ninth Circuit to issuing injunctions *only*

with respect to the detention of "an individual alien against whom proceedings under such part have been initiated." Section 1252(f) thus barred the class-wide relief granted by the lower courts.

The Ninth Circuit may have concluded, as it did in *Jennings*, that while § 1252(f) bars a class-wide injunction against enforcement of § 1226(c) (if, *e.g.*, § 1226(c) were deemed unconstitutional), it did not bar courts from enjoining, on a class-wide basis, conduct "not authorized by the statute." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120-21 (9th Cir. 2010), *rev'd on other grounds sub nom., Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Amici disagree that § 1252(f) can be read in so limited a fashion. But even if the statute does not withdraw federal court jurisdiction to issue class-wide injunctive relief against immigration officials alleged to be violating the terms of § 1226(c), it indisputably bars class-wide injunctive relief against immigration officials alleged to be violating the constitutional rights of criminal aliens being detained pursuant to § 1226(c).

That distinction comes into play if the Court reverses the judgment below and then remands for consideration of Respondents' due-process claims, which have not yet been addressed by the courts below. In any such remand, the Court should direct the lower courts—as it did in its *Jennings* remand—to consider decertifying the plaintiff classes with respect to Respondents' claim that mandatory detention under § 1226(c) violates their due process rights.

Jennings stated that even if the Ninth Circuit

had correctly reasoned that § 1252(f)(1) authorized the exercise of jurisdiction over class-wide challenges to the Government's assertion that § 1226(c) permitted prolonged detention of criminal aliens without providing bond hearings, that "reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims." 138 S. Ct. at 851.

Jennings also calls into question whether Respondents can satisfy the requirements for class certification established by Rule 23(a), which requires plaintiffs to demonstrate the existence of issues of law or fact common to the class. *Id.* at 852. *Jennings* questioned whether criminal aliens challenging their mandatory § 1226(c) detention on due-process grounds could meet the commonality requirement given the inherently individualized nature of due-process claims. *Ibid.*

That rationale for decertifying the classes seems particularly apt here; the due-process claim of each of the Respondents likely depends for its success on highly individualized facts. Respondents argue that due process bars the Government from taking them into custody for long-ago criminal convictions, for which they served their sentences and then re-established their ties to American society. The strength of any such claim likely depends on the number of years the alien has lived freely in the United States following completion of his criminal sentence. Obviously, a criminal alien who completed his sentence 20 years ago has stronger due-process claims than a

criminal alien who was taken into ICE custody within a matter of months of his release from criminal detention. *Jennings* strongly suggests that due-process claims of the sort at issue here are inappropriate for consideration on a class-wide basis in light of the individualized nature of the issues raised by such claims.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

June 8, 2018

No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

MONY PREAP, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE CONSTITUTIONAL AND IMMIGRATION LAW PROFESSORS IN SUPPORT OF RESPONDENTS

MARK C. FLEMING
Counsel of Record
ANNALEIGH E. CURTIS, PH.D.
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. DUE PROCESS DOES NOT PERMIT MANDATORY DETENTION, WITHOUT ANY INDIVIDUALIZED DETERMINATION OF RISK OF FLIGHT OR DANGER, OF NONCITIZENS WHO HAVE LONG SINCE BEEN RELEASED FROM CRIMINAL CUSTODY 2

A. Due Process Requires An Individualized Determination Of Flight Risk Or Danger Before Locking Up A Person Who Is Otherwise At Liberty 2

B. The Government's Desire For An Irrebuttable Presumption Of Flight Risk Or Danger Is Improper Where The Individual Is At Liberty 7

C. Bond Hearings For Noncitizens Who Are Not Taken Into Immigration Custody Immediately Upon Release Do Not Compromise The Government's Ability To Enforce The Immigration Laws 11

TABLE OF CONTENTS—Continued

Page

II. IF, AS THE GOVERNMENT CONTENDS, THE STATUTE IS AMBIGUOUS, THE COURT SHOULD AVOID THE GOVERNMENT'S INTERPRETATION, WHICH RAISES SERIOUS CONSTITUTIONAL QUESTIONS 14

CONCLUSION 18

APPENDIX: List of Amici 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 16

Barker v. *Wingo*, 407 U.S. 514 (1972) 9

Bridges v. *Wixon*, 326 U.S. 135 (1945) 8

Castaneda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 14

Clark v. *Martinez*, 543 U.S. 371 (2005) 16, 17

Demore v. *Kim*, 538 U.S. 510 (2003) ..... *passim*

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) 15

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 3, 4

Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 14

In re Adeniji, 22 I&N Dec. 1102 (BIA 1999) 11

In re Guerra, 24 I&N Dec. 37 (BIA 2006) 11

In re Rojas, 23 I&N Dec. 117 (BIA 2001) 14

INS v. *St. Cyr*, 533 U.S. 289 (2001) 17

Jackson v. *Indiana*, 406 U.S. 715 (1972) 3

Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 3, 6, 15

Kansas v. *Hendricks*, 521 U.S. 346 (1997) 3, 4

Kim v. *Schiltgen*, 1999 WL 33944060 (N.D. Cal. Aug. 11, 1999) 5

Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953) 3

Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Mathews v. *Diaz*, 426 U.S. 67 (1976) 3

Olmos v. *Holder*, 780 F.3d 1313 (10th Cir. 2015) 14

Plyler v. *Doe*, 457 U.S. 202 (1982) 3

Schall v. *Martin*, 467 U.S. 253 (1984) 4

Solid Waste Agency v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) 16

Stack v. *Boyle*, 342 U.S. 1 (1951) 4

Sylvain v. *Attorney General of United States*, 714 F.3d 150 (3d Cir. 2013) 14

Troxel v. *Granville*, 530 U.S. 57 (2000) 8

United States ex rel. Attorney General v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 15, 16

United States v. *Salerno*, 481 U.S. 739 (1987) 4

Wong Wing v. *United States*, 163 U.S. 228 (1896) 2, 3

Woodby v. *INS*, 385 U.S. 276 (1966) 9

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 3

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V 2

8 U.S.C. § 1226 ..... *passim*

8 U.S.C. § 1229b 9

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

ACLU, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants* (2016), *available at* https://perma.cc/M6EG-PLYW 6

Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Budget Overview, Fiscal Year 2019 Congressional Justification* (2018), *available at* https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf 12

EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), *available at* https://perma.cc/SD32-FGRB 6

Koulish, Robert, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5 Laws 1 (2016), *available at* https://perma.cc/BH9J-E4AW 13

Letter from Acting Solicitor General Ian H. Gershengorn to Hon. Scott S. Harris, Clerk, Supreme Court, *Demore* v. *Kim*, No. 01-1491 (Aug. 26, 2016) 5, 6

Patler, Caitlin, UCLA Institute for Research on Labor and Employment, *The Economic Impacts of Long-Term Immigration Detention in Southern California* (2015) 9

S. Rep. No. 104-48 (1995) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Scalia, Antonin & Garner, Bryan, *Reading Law: The Interpretation of Legal Texts* (2012) 15, 16

U.S. Government Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* (2014), *available at* https://perma.cc/U9KD-GVVT 13

INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach, research, and write about constitutional and immigration law, including the principles of due process and issues related to immigration detention. A complete list of amici's names, titles, and affiliations is set forth in the appendix to this brief.

Amici present this brief to provide analysis regarding the grave constitutional concerns raised by the government's interpretation of the statutory provision at issue in this case.

SUMMARY OF ARGUMENT

Interpreting 8 U.S.C. § 1226(c) to mean that all noncitizens who are charged as removable on account of certain criminal convictions must be detained without an individualized hearing—even those who have long been at liberty after having served their sentences—raises serious constitutional questions under the Due Process Clause of the Fifth Amendment. Freedom from arbitrary restraint forms the core of the liberty interest protected by the Constitution. Detention pending removal proceedings is permissible only to mitigate flight risk or public danger, and determining an individual's risk of flight or danger requires an individualized inquiry, not the irrebuttable presumptions and broad generalizations the government reads into § 1226(c). Although the Court has permitted brief immigration detentions without individualized hearings

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

immediately following criminal custody, that limited exception cannot apply to individuals who have long been at liberty following their release from criminal custody. There is little justification for an irrebuttable presumption of flight risk or danger in the case of noncitizens who are at liberty and likely to have deep ties to family, friends, work, and property in this country. Detaining such people without an individualized finding of flight risk or danger simply because they were in criminal custody at some time in the past is inconsistent with the Constitution's core protection of physical liberty. The government's interpretation should be avoided in favor of the interpretation, consistent with the statute's text, that mandatory detention only applies to noncitizens detained "when [they are] released" from criminal custody. This interpretation does not deprive the government of adequate control over the removal process, as the government may still detain long-released people who are determined through adequate procedures to pose a flight risk or a danger to the community.

ARGUMENT

I. Due Process Does Not Permit Mandatory Detention, Without Any Individualized Determination Of Risk Of Flight Or Danger, Of Noncitizens Who Have Long Since Been Released From Criminal Custody

A. Due Process Requires An Individualized Determination Of Flight Risk Or Danger Before Locking Up A Person Who Is Otherwise At Liberty

"No person shall be ... deprived of life, liberty, or property without due process of law." U.S. Const.

amend. V. A noncitizen is a "person." *See Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). This Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982)); *see also Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-598 & n.5 (1953); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (applying Fourteenth Amendment due process and equal protection provisions "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690; *see also, e.g.*, *Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997); *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). Physical detention is among the most serious deprivations the government can impose on a person.

Where the government imposes civil detention or commitment, due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972); *cf. Zadvydas*, 533 U.S. at 690-691 (discussing the inadequacy of the government's justification for indefinite detention based on non-individualized determinations as to flight risk and dangerousness). Where, as here, detention is invoked as a means to protect the public or support the removal process, an individual's detention must in fact protect the public or assure her appearance at a removal hearing. *See Zadvydas*, 533 U.S. at 690-

691; *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) (citing *United States* v. *Salerno*, 481 U.S. 739, 748-751 (1987); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951)).

The Court has been clear that due process contains both a substantive prohibition on arbitrary imprisonment as well as procedural protections to ensure that that substantive prohibition is observed. In upholding the constitutionality of detention without bond under the Bail Reform Act, and finding that the statute's use of a rebuttable presumption of dangerousness was not punitive, the Court noted that the act contained significant procedural protections, including an adversarial hearing before a neutral decisionmaker. *See Salerno*, 481 U.S. at 750; *see also Schall* v. *Martin*, 467 U.S. 253, 277 (1984) (requiring notice and a fair adversarial hearing to justify preventive detention of juveniles). Detention in *Salerno* was also temporally limited by the Speedy Trial Act. 481 U.S. at 747. Similarly, the Court allowed involuntary civil commitment for sex offenders only where procedural safeguards included a jury trial and proof beyond a reasonable doubt. *Hendricks*, 521 U.S. at 367-368. Further detention was allowed only subject to annual review of its continued need. *Id.* at 357. Also in the civil context, continued post-acquittal detention in a mental facility must be accompanied by "constitutionally adequate procedures to establish the grounds for ... confinement." *Foucha*, 504 U.S. at 79. These cases confirm that the Due Process Clause permits detention of a person who is otherwise at liberty only following individualized procedural guarantees that ensure that the detention is necessary to mitigate a risk of flight or danger.

Although the government relies heavily on *Demore* v. *Kim*, 538 U.S. 510 (2003), that case did not involve a

detainee who had long been at liberty. The respondent in *Demore* was detained when released from criminal custody, so the argument made by respondents in this case was not available to him, nor was it before the Court. *See Kim* v. *Schiltgen*, 1999 WL 33944060, at *1 (N.D. Cal. Aug. 11, 1999) ("His estimated release date was February 1, 1999.... The notice to appear was served on Kim on February 2, 1999, after he had completed his prison sentence, and Kim was accordingly taken into INS custody."), *aff'd sub nom. Kim* v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev'd sub nom. Demore* v. *Kim*, 538 U.S. 510 (2003).

As explained in Section I.B below, it is improper to impose an irrebuttable presumption—as the government seeks to do here—that someone who has long been at liberty poses a risk of flight or danger merely because of a prior criminal conviction. Even if such a presumption were justified in the narrow circumstance presented in *Demore*, extending it to persons who have been physically unrestrained for often lengthy periods—and frequently have used that time to develop the very sort of community ties that make them unlikely to flee and more likely to receive relief from removal—would be arbitrary and punitive.

Further, *Demore* rested on the Court's view that detention without bond for noncitizens with certain criminal convictions and who are detained promptly when released was necessary only "for the brief period necessary for their removal proceedings," and that that period on average was very short, often well below 90 days. 538 U.S. at 513. That assumption was incorrect even when considering people detained upon completion of a criminal sentence: the government has now admitted error with respect to the statistics provided in *Demore*. *See* Letter from Acting Solicitor General

Ian H. Gershengorn to Hon. Scott S. Harris, Clerk, Supreme Court 1, *Demore*, No. 01-1491 (Aug. 26, 2016). At the time of *Demore*, the average length of detention in appealed cases was over a year, *see id.* at 3, more than double the assumption relied upon by the Court. According to the government's own recent statistics, between 2003 and 2015, more than 32,000 people were detained for over six months, more than 10,000 people for over a year, and more than 2,000 people for over two years. EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), *available at* https://perma.cc/SD32-FGRB. There are good reasons to suspect that even these numbers are low; EOIR does not count detention time until the government files a formal charging document or the time spent during any appeal to the federal courts or remand proceedings before the agency, which may take months or years. *See generally, e.g.*, ACLU, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants* (2016), *available at* https://perma.cc/M6EG-PLYW. Those with significant defenses to removal or meritorious claims often have lengthy proceedings that lead to their being detained much longer than many who do not challenge removal. *Id.* at 9; *see also Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting). As the following section shows, these considerations are likely to prolong detention even further in the case of people who have been released from custody, as they are likely to have stronger cases for relief from removal that require development before the agency and courts of appeals.

B. The Government's Desire For An Irrebuttable Presumption Of Flight Risk Or Danger Is Improper Where The Individual Is At Liberty

The government argues that its interpretation of § 1226(c) reflects Congress's "categorical judgment" that noncitizens who have long since been released from criminal custody and have been living peaceably in the community nonetheless pose a risk of flight or danger. Pet. Br. 23. That bare assertion is unsupported and cannot justify the blanket imposition of an irrebuttable presumption of detention; if anything, it only reinforces the arbitrary and punitive nature of the government's proposed scheme.

Noncitizens who have lived freely for years following release from criminal custody are more likely to have developed significant community ties than are persons who are transferred immediately from criminal custody to immigration custody. Persons in respondents' position, who completed a sentence potentially long ago, have often found work, developed or revived a stable family life, pursued an education, supported U.S. citizen relatives, cared for aging parents, or otherwise led peaceful and productive lives. Respondents themselves detailed the ways in which their post-release liberty allowed them to develop and enhance these ties to the United States. *See, e.g.*, Decl. of Mony Preap ¶¶4-5, Dist. Ct. Dkt. 8-1 ("Preap Decl.") (following release from criminal custody and before immigration detention, Mr. Preap had sole custody of his U.S. citizen son, cared for his mother who is a breast cancer survivor, and worked part time); Decl. of Juan Lozano Magdaleno ¶6, Dist. Ct. Dkt. 8-3 ("Magdaleno Decl.") (following release from criminal custody and before immigration detention, Mr. Magdaleno provided financially for his wife and helped support his children and grandchildren, in-

cluding caring for four grandchildren before and after school each day). The Constitution recognizes the importance of these liberty interests. *See, e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.) (calling the liberty "interest of parents in the care, custody, and control of their children ... perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (noting the liberty interest in "the right to stay and live and work in this land of freedom").

The accumulation of personal, familial, professional, and property connections following release from criminal custody is important for two reasons. First, it significantly reduces the risk of flight and danger. Noncitizens who care for their families, hold title to homes, cars, or other property in their names, attend church or community events, and work steady jobs are unlikely to flee just because they are the subject of immigration proceedings. Individuals who have been at liberty are less likely to flee precisely because they would be fleeing their families, their livelihoods, and their property.[2] Community ties also make noncitizens less likely to be judged dangers to their communities, where they have been living peaceably otherwise. The government has offered no proof that jurisdictions where the decision below gave such individuals the opportunity to seek release on bond pending removal proceedings somehow experienced a higher level of flight or danger. By contrast, detention causes significant hardship for many

---

[2] Of course, that does not mean that people who are detained immediately following release from criminal custody lack community ties; in fact, many have strong ties. For purposes of this case, however, what matters is that individuals who have been living freely for years often have had far greater opportunity to develop and maintain such ties.

noncitizens and their families. For example, one study of detention in Southern California found that 94% of those in detention are a significant source of financial or emotional support for their families. *See* Patler, UCLA Institute for Research on Labor and Employment, *The Economic Impacts of Long-Term Immigration Detention in Southern California* 3 (2015). Of those 94%, "nearly two-thirds (64%) ... reported that during their time in detention, their family was late paying rent, mortgage, or utility bills." *Id.*; *see also Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972) ("The time spent in jail awaiting trial ... often means loss of a job; it disrupts family life; and it enforces idleness. ... The time spent in jail is simply dead time.").

Second, the close connections that many noncitizens develop while at liberty are relevant in removal proceedings and decrease the chance that they will actually be removed. For example, community ties can strengthen a noncitizen's bid for discretionary relief, such as cancellation of removal. *See* 8 U.S.C. § 1229b(a)-(b). Section 1229b(b)(1)(D), for example, allows cancellation where "removal would result in exceptional and extremely unusual hardship" to a U.S. citizen relative. Lead respondent Mony Preap is such an example: his care for his mother, a refugee who fled torture by the Khmer Rouge and who developed a seizure disorder while in remission from cancer (Preap Decl. ¶¶2, 4), was part of the constellation of facts that led the government to cancel his removal. Pet. App. 6a-7a, 63a-64a. *Cf. Woodby* v. *INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens."). Further, noncitizens who are released after completing sentences for addiction-related

convictions can receive medical treatment and benefit from reentry programs that dramatically reduce the risk of reoffense and increase the chance of obtaining discretionary relief from removal. *See generally* Advancement Project Amicus Br. (discussing, in particular, the case of "Jennifer Frank").

The government's interpretation improperly assumes that noncitizens who, long after having been released from criminal custody, own homes, have families and friends, and are fixtures in their community would suddenly abandon their family and property once removal proceedings begin. The Constitution does not permit such an assumption when personal liberty is at stake. Rather, a neutral decisionmaker must determine that physical confinement is necessary to prevent flight or danger. The government's suggestion that a hearing would "reward[] a criminal alien" or be "a windfall upon dangerous criminals," Pet. Br. 28-29, 40, is baseless; an individualized hearing is designed precisely to assess whether the individual is in fact "dangerous" or a flight risk. If a neutral decisionmaker so concludes, then bond will be denied. But it is no "windfall" to allow someone to remain at liberty if she is found to be neither dangerous nor a flight risk and may be released on bond. On the contrary, it is the essence of due process that such a person *not* be detained, as her detention would be irrational or arbitrary. Indeed, a bond hearing for such a person is exactly what Congress contemplated when providing for bond hearings as the default in § 1226(a), subject to the narrow exception of § 1226(c).

C. Bond Hearings For Noncitizens Who Are Not Taken Into Immigration Custody Immediately Upon Release Do Not Compromise The Government's Ability To Enforce The Immigration Laws

The government claims (Pet. Br. 24) that the proper interpretation of § 1226(c) would undermine its ability to enforce the immigration laws. That argument again misconstrues the issue: the alternative to mandatory detention is not indiscriminate release, but rather individualized determinations regarding danger and flight risk. The statute already provides a bond process for noncitizens like respondents who do not fall under § 1226(c). 8 U.S.C. § 1226(a). The BIA's precedent places the burden of proof on the noncitizen to show she is not a flight risk or danger.[3] *See In re Guerra*, 24 I&N Dec. 37 (BIA 2006); *In re Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Respondents adduced significant evidence of this sort—their relationships to U.S. citizen family members, their property interests, their work history, their church or community group involvement, and other ties they have developed in the time since their release from criminal custody. *See* Resp. Br. 7-9; *see also generally* Preap Decl.; Magdaleno Decl.

The government has presented no convincing argument that this procedure is burdensome or likely to result in mistaken releases of people who are flight risks or dangers to the public. The government reasserts statistics from a 1995 Senate Subcommittee Report cited in *Demore*, S. Rep. No. 104-48, at 1 (1995), but that report—now over two decades old—covered

---

[3] Amici do not concede that the burden to show flight risk or dangerousness is properly on the individual, but merely note that the government currently proceeds as if it is.

noncitizens of all sorts, not just those who have been at liberty for a substantial period of time and are accordingly unlikely to flee. Nor is there any support for the government's *ipse dixit* that individualized determinations of flight risk or danger would "re-enabl[e] the very problems of flight and recidivism ... that Congress enacted Section 1226(c) to prevent." Pet. Br. 24. Again, where particular individuals in fact pose risks of "flight and recidivism," bond will and should be denied. The government offers no evidence suggesting that "flight and recidivism" have increased in the times and places in which § 1226(c) has been held not to apply to people like respondents.

The government's argument is also out of step with the government's own strategies to reduce flight risk for those noncitizens who are released on bond. The government currently employs numerous measures to ensure appearance at removal proceedings while protecting noncitizens' liberty interests. The government uses "a combination of home visits, office visits, alert response, court tracking, and/or technology" as part of what ICE calls Alternatives to Detention ("ATD"). Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Budget Overview, Fiscal Year 2019 Congressional Justification* 142 (2018), *available at* https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf. "Historically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings." *Id.* There is no reason why these same steps could not be used for noncitizens with criminal convictions who are determined not to be flight risks or dangers to the community through an individualized hearing. Indeed, ATD methods may be particularly suited for use with noncit-

izens who have stable and supportive connections to their community. For example, the government operates programs like the Intensive Supervision Appearance Program ("ISAP"), which uses case management principles and location monitoring to facilitate hearing attendance and compliance with orders. Virtually every participant in ISAP from 2011 to 2013 appeared at scheduled hearings. U.S. Gov't Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* 30 (2014), *available at* https://perma.cc/U9KD-GVVT.

The government also employs risk management tools to assess flight risks and danger to the community. ICE has its own risk assessment tool called the Risk Classification Assessment ("RCA"). The RCA is a computer program that has a number of inputs: criminal and immigration history, family and personal data, local ties, family history, residency history, substance abuse, gang affiliations, and other individualized information gleaned from existing records and an intake interview. Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5 Laws 1, 7 (2016), *available at* https://perma.cc/BH9J-E4AW. "The algorithm then recommends detention or release, the amount of bail (if any), and detention or supervision levels." *Id.* A recent study of RCA scores found that "mandatory detainees are no more dangerous, or risky, than any other immigrant in immigration custody," including those who are eligible for bond or released outright. *Id.* at 15.

The government has accordingly shown no reason why its interests in enforcing the immigration laws in any way outweigh the interest of free persons in not being locked up again without an individual determination of flight risk or danger. That individual liberty interest, protected by the Due Process Clause, cannot be

overridden simply because the government prefers to detain people en masse.

II. If, As The Government Contends, The Statute Is Ambiguous, The Court Should Avoid The Government's Interpretation, Which Raises Serious Constitutional Questions

The government has consistently argued that the statutory language is ambiguous as to the meaning of "when ... released."[4] The BIA has also so ruled, *In re Rojas*, 23 I&N Dec. 117, 120 (BIA 2001), and many courts of appeals have as well.[5] That does not help the government, however; even assuming the statute is ambiguous, it should be construed to avoid the serious constitutional questions that the government's approach raises.

---

[4] *See, e.g.*, Pet. 9 n.3 ("Paragraph (1) is also ambiguous with respect to whether 'when the alien is released' means 'at or around the same time,' or 'in the event that.'"); Pet. Br. 17 ("That clause standing alone could be read to mean either 'at or during the time that' ('while') the alien is released, or 'just after the moment that' he is released."); Defs.-Appellants' C.A. Reply Br. 4 ("Section 1226(c) is ambiguous."); *id.* at 2 ("[T]he word 'when' has multiple meanings."); *see also Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 156 nn.5, 6 (3d Cir. 2013) (noting that the government argued the language was ambiguous but declining to address the issue as unnecessary to its holding).

[5] *See, e.g.*, *Castaneda* v. *Souza*, 810 F.3d 15, 38 (1st Cir. 2015) (opinion of Barron, J.) (half of a divided *en banc* court finding that "when" connotes immediacy); *id.* at 49 (opinion of Kayatta, J.) (other half of the divided *en banc* court: "We also agree with our colleagues—and with the BIA—that the statutory language is not so plain as to foreclose all extra-textual inquiry."); *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015) (holding the statute ambiguous), *vacated on other grounds*, 138 S. Ct. 1260 (2018); *Hosh* v. *Lucero*, 680 F.3d 375, 379 (4th Cir. 2012) (same); *Olmos* v. *Holder*, 780 F.3d 1313, 1318 (10th Cir. 2015) (same).

"[A] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012); *see also Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). As the Court recently stated, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings*, 138 S. Ct. at 836.

The Court considered but rejected use of the canon when interpreting other language from § 1226. *See Jennings*, 138 S. Ct. at 842. There, however, the Court held that the statute was not ambiguous. *Id.* The Court held that the language did not permit two interpretations of the appropriate detention period, because no artificial time limit could be derived from § 1226(c)'s inclusion of a "'definite termination point.'" *Id.* at 846.

Here, if the statute is ambiguous, as the government has contended and the BIA has held, the statute must be interpreted and the canon of constitutional avoidance applied in the process. Section 1226(c)—specifically the words "when the alien is released"—can easily be read in a way that avoids the constitutional difficulty, namely by limiting mandatory detention to noncitizens who are placed in immigration detention immediately following the time at which they are released from criminal custody. Use of the canon is

therefore appropriate to choose respondents' interpretation—that § 1226(c)'s mandatory detention scheme does not apply to noncitizens who have been at liberty after their release from criminal custody.

Proper use of the canon does not require a decision on the merits of the constitutional question, but "merely a determination of serious constitutional *doubt*." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting). There is no requirement that the Court be convinced that a contested interpretation is actually unconstitutional (although in this case, the government's interpretation clearly is). To the contrary, only serious doubts are required. Indeed, the canon would lose some of its utility if the Court were required to decide the constitutional issue. *See, e.g.*, *Delaware & Hudson Co.*, 213 U.S. at 408 (rejecting the view that constitutional avoidance requires courts "to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution"); *see also Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) ("[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.").

The Court should assume that Congress legislates within the bounds of the Constitution. "[T]he canon rests ... upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature." Scalia & Garner, *supra*, at 249. The canon is related to a clear statement rule—if Congress wishes to approach the outer bounds of constitutionality, then it must do so explicitly and clearly. *See, e.g.*, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting a statutory interpretation that would

raise constitutional questions because there was no "clear statement from Congress"); *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001) ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

The government argues that respondents' interpretation raises "serious practical problems" related to "gaps in custody ... caused by reasons outside the federal government's control." Pet. Br. 25-26. But the statute must be interpreted the same way for individuals who have been at liberty for 30 years as those who have been at liberty for 30 days. *See Clark*, 543 U.S. at 380 (the Court "cannot justify giving the *same* detention provision a different meaning when such aliens are involved. ... The lowest common denominator, as it were, must govern."). As shown in Part I above, the government's interpretation raises clear constitutional questions by allowing detention without an individualized hearing as to flight risk and danger of individuals who have long been at liberty. While there may be complicated line-drawing questions at the margins that can be litigated in other cases, it suffices to affirm the judgment below to hold that the government has failed to show that the statute clearly calls for the unconstitutional result of locking up someone who has long since been released from criminal custody, without any individual determination that confinement is needed to serve any valid governmental purpose. The government may and should continue to detain people who pose actual risks of flight or danger. But it cannot demand the right to deprive vast numbers of individuals of their physical liberty simply because they were in criminal custody at some point in the past and are now in removal proceedings. Without any individual need to

detain such persons, the detention is arbitrary, punitive, and unconstitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARK C. FLEMING
Counsel of Record
ANNALEIGH E. CURTIS, PH.D.
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

AUGUST 2018

APPENDIX

APPENDIX

AMICI CURIAE CONSTITUTIONAL AND IMMIGRATION LAW PROFESSORS

This Appendix provides amici's titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the view expressed herein by amici's institutions.

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
Berkeley School of Law

Kari E. Hong
Assistant Professor
Boston College Law School

Stephen Lee
Associate Dean for Faculty Research and Development and Professor
University of California, Irvine School of Law

Stephen Legomsky
John S. Lehmann University Professor Emeritus
Washington University School of Law

Leah Litman
Assistant Professor of Law
University of California, Irvine School of Law

Hiroshi Motomura
Susan Westerberg Prager Distinguished Professor of Law
University of California, Los Angeles School of Law

Gerald L. Neuman
J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law

Harvard Law School

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Stephen Yale-Loehr
Professor of Immigration Law Practice
Cornell Law School

No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

vs.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
Counsel of Record
KYMBERLEE C. STAPLETON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U. S. C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

TABLE OF CONTENTS

Question presented. i

Table of authorities. iv

Interest of *amicus curiae*. 1

Summary of argument. 2

Argument. 3

I

Non-releaseable criminal aliens are "described" by the "who" clause of § 1226(c)(1), not the "when" clause. 3

A. What, who, and when. 3

B. The inadmissibles. 5

II

The legislative history does not support the notion that Congress intended to grant criminal aliens an exemption from § 1226(c)(1) merely because they were not arrested immediately. 7

Conclusion. 12

Appendix— History of 8 U. S. C. § 1226(c)

TABLE OF AUTHORITIES

Cases

In re Rojas, 23 I. & N. Dec. 117 (BIA 2001). 10

Jennings v. Rodriguez, 583 U. S. __, 138 S. Ct. 830 (2018). 3

United States Statutes

8 U. S. C. § 1226. . . . . 3, 8

8 U. S. C. § 1252. . . . . 8, 11

Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7343, 102 Stat. 4470. 8

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 440(c), 110 Stat. 1277. 11

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009-546. 11

Immigration Act of 1990, Pub. L. 101-649, § 504, 104 Stat. 5049. 9

Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 306(a)(4), 105 Stat. 1751. 10

Secondary Authorities

Federal Bureau of Investigation, 2016 Crime in the United States: Clearances https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances.pdf. 8

H. Rep. No. 101-681, pt. I, 101st Cong., 2d Sess. (1990). 9

H. Rep. No. 101-955, 101st Cong., 2d Sess. (1990). 9

H. Rep. No. 102-383, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U. S. Code Cong. & Admin. News. 10

House of Representatives, Office of the Legislative Counsel, Manual on Drafting Style (1995). 3

Illegal Alien Felons: A Federal Responsibility, Hearing before the Subcommittee on Federal Spending, Budget, and Accounting of the Senate Committee on Governmental Affairs, S. Hrg. 100-344, 100th Cong., 1st Sess. (1987). ... 7

National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report (2004). 5, 6

S. Rep. No. 104-48, 104th Cong., 1st Sess. (1995). 11

U. S. Dept. of Justice, Bureau of Justice Statistics, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) (2018). 8

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

vs.

MONY PREAP, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The Ninth Circuit in this case gave the mandatory detention provision of the Immigration and Nationality Act a strained reading that would effectively nullify it in all cases where a deportable alien criminal was not taken into immigration custody promptly after release from criminal custody. Although the crimes of the particular aliens before the court in this case may be minor, this reading would apply to all cases, no matter how grave the crime, based on the arbitrary and irrelevant circumstance of when the federal immigration authorities were able to take the released felon into custody. It would apply to rapists and kidnappers just as much as to marijuana possessors.

Inevitably, some felons wrongly released under this misinterpretation will victimize innocent people. Such victimization in crimes that are entirely preventable is contrary to the interests CJLF was formed to protect.

SUMMARY OF ARGUMENT

On its face, 8 U. S. C. § 1226(c) describes a group of aliens, who are subject to mandatory detention pending removal, by what they have done. Paragraph (1) has clearly separate "who" and "when" provisions, and the "when" is not naturally read as limiting the "who." The Ninth Circuit's reading is far from the only plausible reading, as that court claims; it is not a plausible reading at all.

The history of § 1226(c) and its predecessor demonstrates that Congress did not intend the "when" clause to be a limitation on the "who." At times this has been clear from the wording beyond any doubt, and at others the wording has been susceptible to the same strained reading the Ninth Circuit gave in this case. Yet these variations have been made without comment on the point in the committee reports, evidently because the

strained reading never occurred to the committees drafting the changes.

ARGUMENT

I. Non-releaseable criminal aliens are "described" by the "who" clause of § 1226(c)(1), not the "when" clause.

A. What, Who, and When.

Paragraph (c)(2) of 8 U. S. C. § 1226 provides that "[t]he Attorney General may release an alien described in paragraph (1) only if" narrow conditions regarding witness protection and non-dangerousness are met. This paragraph is both an authorization and a prohibition. The "may" authorizes the Attorney General to release the alien if the conditions are met, and the "only" forbids him to release the alien if they are not. See *Jennings* v. *Rodriguez*, 583 U. S. __, 138 S. Ct. 830, 847 (2018).

The crux of this case is the meaning of "an alien described in paragraph (1)." That paragraph is both an authorization and a command. The command includes both a "who" and a "when." Congress commands the Attorney General to take certain aliens into custody, described in the four subparagraphs (A) through (D)[2] following the word "who," and after those four subparagraphs Congress directs that this be done "when the alien is released . . . ."

---

2. Modern federal statutes have a hierarchical structure of subsections (a, b, c . . .), paragraphs (1, 2, 3 . . .), subparagraphs (A, B, C . . .), clauses (i, ii, iii . . .), and subclauses (I, II, III . . .). See House of Representatives, Office of the Legislative Counsel, Manual on Drafting Style § 312 (1995).

The statutory direction that the Attorney General take these aliens into custody implies a grant of authority that he do so. In the real world, it is not possible that every alien in the large category of aliens encompassed by the subparagraphs be apprehended immediately, raising two closely related questions. Does the Attorney General's authority under paragraph (1) lapse after some not-yet-defined interval? Is an alien who is within the description of paragraph (1)'s "who" clause nevertheless excluded from the class of "alien[s] described in paragraph (1)" by the happenstance that the Attorney General did not succeed in complying with the "when" clause? *Amicus* submits that the answer to both questions is no.

In normal usage, a direction of what to do regarding whom and when to do it does not imply that the "when" limits the "whom," nor does it imply that if the "when" condition cannot be met the act should not be performed at all. In the present case, the Ninth Circuit quoted a useful example from an earlier district court decision: " 'if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command . . . is the expectation that the husband is waiting at the moment' school ends. *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1155 (D. Colo. 2013) . . . ." App. to Pet. for Cert. 21a (emphasis in original).

Yes, that is the expectation, but what if it is not possible to meet? If the husband is stuck in a traffic jam so that he cannot arrive at the school until a half hour later, does he say that compliance with the direction is impossible and go straight home, leaving the kids at the school? Of course not. Varying the hypothetical slightly, if the driver is not the kids' father but instead a third party who needs authorization from a parent to pick up the kids, would we say that the driver is no longer authorized because he did not meet the time

requirement, and again he should just leave them? Of course not. Although the expectation is prompt pick-up, "better late than never" goes without saying.

"Pick up the kids when they finish school" maps precisely to "take custody of certain criminal aliens when they are released." Both are what-who-when. The kids are the "who" in the example, and the aliens specified in subparagraphs (A)-(D) are the "who" of the statute. Neither the command nor the authorization are negated by noncompliance with the time requirement. The kids, or the aliens, to be picked up are the same people, timely or not. The "when" is part of the command, but it is not an all-or-nothing command, and it is not a limit on the authorization.

B. The Inadmissibles.

A closer look at subparagraphs (A) through (D) confirms that the "when" clause cannot be a limitation on the authority to detain. As described in detail in Part II, § 1226(c) has its roots in a provision limited to aliens who were convicted of aggravated felonies after admission, but it was subsequently amended to include persons who are inadmissible by reason of actions prior to their entry into the United States. These added provisions would be rendered nearly void if there is a conjunctive requirement of release from custody.

On June 3, 2000, Mohamed Atta entered the United States on a tourist visa, enrolled in flight training, and applied to change from tourist to student status. See National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report 224 (2004) ("9/11 Report"). He was not in custody at any time while he was in the United States. See *id.*, at 224-231, 241-253 (describing travels and preparation). The only police contact noted in the report is a traffic stop. See *id.*, at 231.

On September 11, 2001, Atta and others hijacked American Airlines Flight 11. Atta took the controls and crashed the plane into the World Trade Center. *Id.*, at 4-7.

Atta was a member of a terrorist organization, see 9/11 Report, at 165-167, inadmissible under 8 U. S. C. § 1182(a)(3)(B) and deportable under 8 U. S. C. § 1227(a)(4)(B). Subparagraph (D) of § 1226 (c)(1) brings such members within the "who" of that paragraph. If his membership had been known, it would surely have been the duty of the Attorney General to take him into custody. Indeed, if Mohamed Atta is not within the class that Congress intended to be detained under subparagraph (D), it is hard to imagine who is.

Yet if the "who" of paragraph (c)(1) is further limited by the "when," Atta would not be within the defined class. It would not be possible to take him into federal custody "when . . . released" because he was never released. The possibility of taking subparagraph (D) aliens into custody when released depends on the happenstance of their being in custody to start with, probably for reasons unrelated to the reason they are inadmissible and deportable. That cannot be a criterion for defining the class of persons to whom paragraph (c)(1) applies.

The Ninth Circuit based its interpretation in part by concluding that in the case of criminal aliens released from prison, limiting the class to those detained promptly upon release was "consistent with Congress's purposes in enacting the mandatory detention provision . . . ." App. to Pet. for Cert. 22a. That conclusion is dubious enough on its face, but it is heavily outweighed by the policy considerations in the case of aliens whose deportability do not depend on a criminal conviction. The Ninth Circuit's interpretation leads to a result that

negates any purpose for including those categories in subsection (c)(1).

Simply on the face of the present statute, without any need for legislative history or deference to the Board of Immigration Appeals, the idea that the "when" clause limits the Attorney General's authority to detain or the restriction on release should be rejected.

II. The legislative history does not support the notion that Congress intended to grant criminal aliens an exemption from § 1226(c)(1) merely because they were not arrested immediately.

The Ninth Circuit is quite certain that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." App. to Pet. for Cert. 22a. Combing through the bills that enacted and amended this provision and its predecessor and the accompanying hearings and reports, *amicus* has not found a single shred of evidence that Congress ever believed that its concerns diminish with the passage of time alone.

The year before the enactment of the predecessor provision, a Senate committee on Federal Spending, Budget, and Accounting held a hearing on the problem of criminal aliens. Senator Chiles, the chair, noted the problem of aliens engaged in drug trafficking posting bond and going right back to the drug trade. See Illegal Alien Felons: A Federal Responsibility, Hearing before the Subcommittee on Federal Spending, Budget, and Accounting of the Senate Committee on Governmental Affairs, S. Hrg. 100-344, 100th Cong., 1st Sess., 2 (1987). This is not a problem that diminishes with time.

The notion that a released criminal is no longer a danger simply because he is not rearrested soon after release is contrary to both common sense and established facts. The Bureau of Justice Statistics recently released data on recidivism with a 9-year follow-up period. "Almost half (47%) of prisoners who did not have an arrest within 3 years of release were arrested during years 4 through 9." U. S. Dept. of Justice, Bureau of Justice Statistics, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) (2018).

A few of the 47% may have "gone straight" for three years and then returned to crime in the outyears, but it is probably much more common that a recidivist simply evaded capture in the early years but eventually slipped up. After all, less than half (45.6%) of violent crimes are cleared, and less than a fifth (18.3%) of property crimes are cleared. See Federal Bureau of Investigation, 2016 Crime in the United States: Clearances 2, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances.pdf (as visited June 4, 2018).

It is entirely consistent with the policy behind this statute to guarantee that an alien convicted of one aggravated felony will not commit another while waiting removal proceedings. An exception might be crafted for those who are demonstrably reintegrated into the community and living productive, law-abiding lives, cf. App. to Pet. for Cert. 3a, but Congress has not crafted one for those covered by § 1226(c)(1), and lapse of time alone does not come close to being an adequate proxy.

The Appendix traces the evolution of what is now 8 U. S. C. § 1226(c). It was originally enacted as 8 U. S. C. § 1252(a)(2) in the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7343, 102 Stat. 4470. It was

only two sentences. The first required the Attorney General to "take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence," and the second flatly forbade release of "such felon." The term "such felon" would most naturally refer only to the criterion of having committed an "aggravated felony" without reference to when the felon was taken into immigration custody, but one might stretch to find the same ambiguity that could be found in the present statute.

Two years later, the provision was amended in the Immigration Act of 1990, Pub. L. 101-649, § 504, 104 Stat. 5049. The amendment was added to S. 358 in the conference committee, and its report notes tersely, "The Conference substitute includes a number of provisions designed to assist INS in the identification, apprehension and deportation of criminal aliens." H. Rep. No. 101-955, 101st Cong., 2d Sess., 132 (1990).

The language was lifted verbatim from the Comprehensive Crime Control Act of 1990, H. R. 5269. See H. Rep. No. 101-681, pt. I, 101st Cong., 2d Sess., 300-301 (1990). The report describes the 1988 law as one that "ordered the INS to detain every alien convicted in the United States of an aggravated felony . . . ." *Id.*, at 147. "Every" does not mean "every one that can be and is detained promptly." It means every one. The amendment rejected the decision of an immigration judge that the direction to detain upon completion of sentence meant that the INS had to wait until the completion of any post-release parole term, see *id.*, at 148, changing "upon completion" to "upon release," with a parenthetical leaving no doubt that this excluded parole and similar conditions. See Appendix, ¶ 2, p. 1a. Congress did soften the provision for permanent resident aliens by allowing release on bond for those

determined to be neither dangerous nor a flight risk, adding a subparagraph (B) to that effect.

The provision was amended again the following year in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 306(a)(4), 105 Stat. 1751. This amendment expanded the discretionary release provision to all lawfully admitted aliens, not just legal permanent residents. More importantly for the present case, the 1991 version of subparagraph (B) had no ambiguity on the point now at issue (emphasis added):

> "(B) The Attorney General may not release from custody *any lawfully admitted alien who has been convicted of an aggravated felony*, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."

This version unmistakably bases the restriction on release solely on the conviction of an aggravated felony with no reference to the take-custody paragraph or the time of taking custody. See *In re Rojas*, 23 I. & N. Dec. 117, 123 (BIA 2001). Yet the committee report on the bill from which this language was taken refers only to expanding the discretionary release exception beyond the permanent resident group with no mention of deleting a timing limitation on the covered class. See H. Rep. No. 102-383, 102d Cong., 1st Sess., 7 (1991), *reprinted in* 1991 U. S. Code Cong. & Admin. News at 1378.

Four years later, in April 1995, a Senate report noted that this " 'technical amendment' " (with quotes implying it was much more than technical) weakened the 1988 Act by this expansion of the discretionary

release exception. See S. Rep. No. 104-48, 104th Cong., 1st Sess., 12 (1995). Yet again, the report made no mention of expanding the scope of the no-release rule by eliminating a timing requirement for the rule to apply. See *ibid*. Evidently, neither the 1991 committee nor the 1995 committee read the 1988 and 1990 versions of the statute as having had a timing limitation on detention authority or eligibility for release in the first place. Later that month, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 440(c), 110 Stat. 1277, repealed the discretionary release subparagraph altogether.

The AEDPA version was soon replaced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009-546. That act reorganized the portion of the Immigration and Nationality Act at issue in this case. Section 303(a), 105 Stat. 3009-585, moved the § 1252(a)(2) language to § 1226(c) [INA § 236], updated the references to other sections of the act also being renumbered, added additional grounds of inclusion in the covered class, and broke out the grounds in subparagraphs for better readability. A narrow discretionary release provision was added, limited to witness protection cases. However, in section 303(b), Congress also provided a transition rule triggered by a finding of "insufficient space for detention." This rule is reproduced in the Appendix, ¶ 3(d), p. 5a. The transitional rule unambiguously has no time-of-custody requirement for discretionary release. It refers to aliens described in two particular clauses of subparagraphs (A) and temporarily reinstates the pre-AEDPA discretionary release for lawfully admitted aliens described in those subparagraphs, as well as those who cannot be deported due to lack of cooperation from their home countries.

If a time-of-release rule really were bound as tightly to congressional policy objectives as the Ninth Circuit opinion claims, it seems very odd that the rule is turned on and off at several points in the history of the law with no mention of such a change in any report. More likely, there is no mention because there is no such rule. From the beginning, the no-release rule has applied to all aliens who meet the substantive criteria of the law, which in the present version are subparagraphs (A) through (D) of paragraph (1).

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 2018

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX

History of 8 U. S. C. § 1226(c), formerly § 1252(a)(2), with additions in *italics* and deletions in ~~strikeout~~.

1. As added by an amendment to 8 U. S. C. § 1252(a) [Immigration and Nationality Act § 242(a)], Pub. L. 100-690, Anti-Drug Abuse Act of 1988, § 7343, 102 Stat. 4470, Nov. 18, 1988:

> (2) The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. Notwithstanding subsection (a), the Attorney General shall not release such felon from custody.

2. As amended by Pub. L. 101-649, Immigration Act of 1990, § 504, 104 Stat. 5049, Nov. 29, 1990:

> (2) *(A)* The Attorney General shall take into custody any alien convicted of an aggravated felony ~~upon completion of the alien's sentence for such conviction~~ *upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense).* Notwithstanding ~~subsection (a)~~ *paragraph (1) or subsections (c) or (d) but subject to subparagraph (B),* the Attorney General shall not release such felon from custody.
>
> *(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.*

3. As amended by Pub. L. 102-232, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 306(a)(4), 105 Stat. 1751:

> (2) (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) or (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.
>
> (B) The Attorney General ~~shall~~ *may not* release from custody ~~an alien who is lawfully admitted for permanent residence~~ *any lawfully admitted alien who has been convicted of an aggravated felony* ~~on bond or such other conditions as the Attorney General may prescribe~~, *either before or after a determination of deportability,* ~~if the Attorney General determines~~ *unless the alien demonstrates to the satisfaction of the Attorney General* that ~~the~~ *such* alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

4. As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(c), 110 Stat. 1277:

> (2) ~~(A)~~ The Attorney General shall take into custody any alien convicted of ~~an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense)~~ *any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D), or any offense*

covered by section 1251(a)(2)(A)(ii) for which both predicate offenses are covered by section 1251(a)(2)(A)(i), upon release of the alien from incarceration, shall deport the alien as expeditiously as possible. Notwithstanding paragraph (1) or subsections (c) or (d) ~~but subject to subparagraph (B)~~, the Attorney General shall not release such felon from custody.

~~(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.~~

5. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Omnibus Consolidated Appropriations Act, Pub. L. 104-208, reorganized and revised this part of the Immigration and Nationality Act:

(a) Section 305(a)(2) of the IIRIRA, 110 Stat. 3009-598, redesignated 8 U. S. C. § 1251 [INA § 241] (referred to in the AEPDA version, above, to designate the covered offenses) as § 1227 [INA § 237].

(b) Section 306(a), 110 Stat. 3009-607, enacted a new § 1252 titled Judicial Review of Orders of Removal.

(c) Section 303(a), 110 Stat. 3009-585, rewrote 8 U. S. C. § 1226 [INA § 236] with subdivision (c) being a revision of former § 1252(a):

(c) DETENTIO[illegible] OF CRIMINAL ALIENS.—

(1) CUSTODY.—The Attorney General shall take into custody any alien ~~convicted of any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C),~~

~~or (D), or any offense covered by section 1251(a)(2)(A)(ii) for which both predicate offenses are covered by section 1251(a)(2)(A)(i),~~ *who—*

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2),

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

(C) is deportable under section 1227(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) or deportable under section 1227(a)(4)(B),

~~upon release of the alien from incarceration, shall deport the alien as expeditiously as possible~~ *when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.*

~~Notwithstanding paragraph (1) or subsections (c) or (d) , the Attorney General shall not release such felon from custody~~.

(2) RELEASE.—The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney

General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Section 303(b), 110 Stat. 3009-586, provided the following transitional rule for the first year after enactment and a possible additional year extension if the Attorney General determined there was insufficient space for detention:

(3) TRANSITION PERIOD CUSTODY RULES.—

(A) IN GENERAL.— During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who—

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, [8 U. S. C. § 1101(a)(43)] as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act [8 U. S. C. § 1182(a)(2)],

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act [former 8 U. S. C. § 1251(a)(2)(A)(ii), (A)(iii), (B), (C), (D)] (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to

whether the alien may be arrested or imprisoned again for the same offense.

(B) RELEASE.—The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and—

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

No. 16-1363

IN THE
Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

v.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE FORMER INS AND DHS GENERAL COUNSELS IN SUPPORT OF RESPONDENTS

MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave NW
Suite 900
Washington, DC 20001
202-639-6873
mprice@jenner.com
Counsel to Amici Curiae

August 13, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Ninth Circuit's Ruling Responds to Congress' Primary Motivations for Enacting 8 U.S.C. § 1226(c) 5

II. The Ninth Circuit's Interpretation Enhances, Rather Than Hampers, DHS's Authority to Detain Criminal Aliens 9

A. The Ninth Circuit's Interpretation Does Not Reduce DHS's Authority or Meaningfully Increase Its Burden to Detain. 10

B. The Government's Interpretation In Fact Limits, Rather Than Maximizes, DHS's Authority 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Castañeda v. Souza, 810 F.3d 15 (1st Cir. 2015) 8

Demore v. Kim, 538 U.S. 510 (2003) 5, 6, 7, 11

Matter of Joseph, 22 I. &N. Dec. 660 (BIA 1999) 11

Preap v. Johnson, 831 F.3d 1193 (9th Cir. 2016) 2

Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009) 6, 9

United States v. Montalvo-Murillo, 495 U.S. 711 (1990) 11

STATUTES

8 U.S.C. § 1226(a) 12

8 U.S.C. § 1226(c) 6, 7, 8, 12

8 U.S.C. § 1226(c)(1) 6

8 U.S.C. § 1226(c)(1)(A) 6

8 U.S.C. § 1226(c)(1)(B) 6

8 U.S.C. § 1226(c)(1)(C) 6

8 U.S.C. § 1226(c)(1)(D) 6

OTHER AUTHORITIES

Laurence Benenson, National Immigration Forum, *The Math of Immigration Detention, 2018 Updated: The Costs Continue to Multiply* (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/ 7

U.S. Dep't of Homeland Security, Office of Inspector General, *ICE's Release of Immigration Detainees* (Aug. 2014), http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf 14, 15

U.S. Government Accountability Office, GAO-18-343, Immigration Detention: Opportunities Exist to Improve Cost Estimates (2018), https://www.gao.gov/assets/700/691330.pdf 7

INTEREST OF AMICI CURIAE[1]

Amici are former General Counsels of the Department of Homeland Security ("DHS") and/or the United States Immigration and Naturalization Service ("INS"). As officials who have borne key responsibilities for enforcing the detention statute at issue in this case, managing the agency budget, and making decisions about whether to seek detention of noncitizens subject to removal proceedings, Amici offer a unique perspective to this Court on the practical implications of the parties' arguments.

The signatories of this brief include:

T. Alexander Aleinikoff. Mr. Aleinikoff served as General Counsel of INS from 1994 to 1995; Executive Associate Commissioner for Programs at INS from 1995 to 1996; and United Nations Deputy High Commissioner for Refugees from 2010 to 2015. He is currently the Director of the Zolberg Institute on Migration and Mobility at The New School.

Bo Cooper. Mr. Cooper served as General Counsel of INS from 1999 to 2003. He currently is a partner in the law firm of Fragomen, Del Rey, Bernsen, & Loewy LLP.

---

[1] Both Petitioners and Respondents have provided written consent to the filing of this brief. Counsel for Amici state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amici or their counsel made a monetary contribution for its preparation or submission.

David A. Martin. Mr. Martin served as General Counsel of INS from 1995 to 1998, and as Principal Deputy General Counsel of DHS from 2009 through 2010. He served as Acting General Counsel of DHS from January through May 2009. He is currently Warner-Booker Distinguished Professor of International Law Emeritus at the University of Virginia School of Law.

Paul W. Virtue. Mr. Virtue served as acting Executive Associate Commissioner for Programs at INS from 1997 to 1998; as Deputy General Counsel of INS from 1997 to 1998; and as General Counsel of INS from 1998 to 1999. As Deputy General Counsel, he developed government policy on the issue of eligibility for discretionary relief in deportation proceedings. He is currently a partner in the law firm of Mayer Brown.

SUMMARY OF ARGUMENT

Amici's experience supports the Ninth Circuit's holding that Congress intended the mandatory detention provision of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), to apply only to criminal aliens who are taken into custody promptly, or within a reasonable period of time, following their release from criminal custody. *See Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016). If immigration detention does not occur within a reasonable time following release from criminal custody, Congress intended for DHS to use its discretionary detention authority under 8 U.S.C. § 1226(a), subject to an individualized bond hearing by an immigration judge. *See* 831 F.3d at 1199.

The Government contends that Section 1226(c) subjects all criminal aliens listed in the statute to mandatory detention, regardless of when DHS detains them. According to the Government, providing an individualized bond hearing to such individuals, even when they have been living in the community for years following their release from criminal custody, would frustrate Congress's categorical judgment that individuals who have been arrested for certain crimes present both a danger to the community and a flight risk.

Congress did not make any such determination. A categorical judgment regarding the likelihood of recidivism or flight may be appropriate when a noncitizen enters immigration detention contemporaneously with his or her release from criminal custody, because neither DHS nor an immigration judge would have any post-release track record on which to evaluate the individual's likelihood of danger or flight. Moreover, mandatory detention in such circumstances maintains a chain of custody that facilitates a streamlined process for removal. But when there is a significant post-release track record for DHS and an immigration judge to consider, a categorical approach is unnecessarily restrictive and wasteful of the Government's resources. In Amici's experience, many individuals who have spent an extended period of time living in the community following their release from criminal custody develop substantial ties to the community, such as family, friends and jobs, that can give DHS and immigration judges a basis to determine that they pose neither a danger nor a flight risk, and

need not be detained at public expense and significant personal hardship.

Moreover, requiring that such individuals be detained inappropriately constrains DHS's discretion to prioritize who most urgently needs to be detained, given the finite number of detention beds available. It would have been irrational for Congress to have required DHS to detain a person who had been living in the community for years following release, and who had a post-release record showing no danger to the community and strong ties that minimize flight risk, when detaining that person would require the release of an individual who has no criminal history but is specifically believed to be a danger or flight risk. Yet when detention facilities are near or at capacity, the Government's position would require such irrationality. Indeed, Congress has never come close to appropriating sufficient funds to put all criminal aliens in mandatory detention. Instead, Congress wanted to prioritize certain noncitizens for mandatory detention—those placed into immigration detention upon their release from criminal custody.

The Government contends that DHS can face practical difficulties in detaining individuals promptly following their release from criminal custody. Certainly, such practical difficulties do exist. But they are not caused by the Ninth Circuit's interpretation of Section 1226(c). The question this Court must answer is whether Congress intended detention to be mandatory even when DHS—for whatever reason—arrests a noncitizen only after an extended period has elapsed since his or her release from criminal custody.

In that situation, there is a reliable basis for an individualized assessment of danger and flight risk. Congress did not intend a categorical detention mandate in those circumstances.

The Government also contends that the Ninth Circuit's reading of the statute would deprive the public of the benefit of mandatory detention. But that benefit stems from avoiding errors that may result from individualized determinations of danger or flight risk in the absence of any individualized post-release track record. Where there is such a track record, mandatory detention is more likely to result in unnecessary detention, which imposes costs to the public that far exceed any benefit from eliminating agency discretion.

ARGUMENT

I. The Ninth Circuit's Ruling Responds to Congress' Primary Motivations for Enacting 8 U.S.C. § 1226(c).

Congress enacted Section 1226(c) in 1996 because it was "concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore v. Kim*, 538 U.S. 510, 513 (2003). The evidence before Congress indicated that, at that time, "INS could not even *identify* most deportable aliens" in criminal custody, "much less locate them and remove them from the country." *Id.* at 518 (emphasis in original). This imposed costs on society: in particular, "deportable criminal aliens who remained in the United States often committed more crimes before being

removed." *Id.* Approximately three-quarters were arrested again, and nearly half were arrested multiple times before they were even placed into removal proceedings. *Id.* Moreover, a large fraction—about one in five—"failed to appear for their removal proceedings," *id.* at 519, and about "one out of four criminal aliens released on bond absconded prior to the completion of ... removal proceedings." *Id.* at 520.

Accordingly, Congress made a categorical judgment to direct the mandatory detention of certain criminal aliens "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). As the Government explains in its brief, "Section 1226(c) eliminates the need for immigration judges to make inherently difficult predictions about which criminal aliens will flee or reoffend." Petr. Br. 10.

Of course, Congress did not mandate detention of every noncitizen in removal proceedings: it limited mandatory detention to certain categories of noncitizens who had committed specifically enumerated offenses, 8 U.S.C. § 1226(c)(1)(A)-(D), and who would be detained "when ... released" from criminal custody. *Id.* § 1226(c); *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009) ("The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply.").

Mandatory detention, after all, carries significant costs: costs to the public, as detention is expensive (at

least $48,000 per bed annually, though this is likely a significant underestimate);[2] and costs to the individuals who are detained for a period of months and potentially years while their immigration cases remain pending. In identifying a subset of individuals to subject to mandatory detention, Congress implicitly weighed the costs and benefits of making a categorical judgment in favor of detention. *See Demore*, 538 U.S. at 518-20.

The question here is whether Congress, in weighing the benefits against the costs, intended to mandate detention even in circumstances where an extended post-release track record would allow DHS and immigration judges to make reliable predictive judgments about whether a particular noncitizen posed a danger or a flight risk.

Neither the text of the statute nor its purposes suggest that Congress intended to mandate detention in such circumstances.

As a matter of text, Section 1226(c) defines with specificity which noncitizens should be subjected to mandatory detention: those who have committed certain crimes are to be taken into immigration custody "when ... released" from criminal custody. 8 U.S.C.

---

[2] U.S. Government Accountability Office, GAO-18-343, Immigration Detention: Opportunities Exist to Improve Cost Estimates 32 tbl.4 (2018), https://www.gao.gov/assets/700/691330.pdf; Laurence Benenson, National Immigration Forum, The Math of Immigration Detention, 2018 Updated: The Costs Continue to Multiply (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.

§ 1226(c). The term "when ... released" places a temporal limitation on the class of individuals covered by Section 1226(c). Noncitizens who are placed into immigration custody contemporaneous with their release from criminal custody are covered by Subsection (c); those who are arrested by immigration officers months or years after their release from criminal custody fall outside of it.

The Government instead reads Section 1226(c) to mean "after release." It argues that in the absence of a specified time limit in the statute for DHS to take criminal aliens into custody, "the natural inference is that Congress did not intend for a delay in custody to be relevant at all." Petr. Br. 21. But the statute does include a specified time limit: it says "when ... released." 8 U.S.C. § 1226(c). "Congress chose a word, 'when,' that naturally conveys some degree of immediacy as opposed to a purely conditional word, such as 'if.'" *Castañeda v. Souza*, 810 F.3d 15, 37 (1st Cir. 2015); *see* Resp. Br. 15-29 (discussing the text of Section 1226(c) at length).

As for statutory purpose, Congress deliberately chose the phrase "when ... released" to identify the particular circumstances that warrant mandatory detention procedures—those soon after release from criminal custody, when the actual flight or danger risk posed by a criminal alien is unknown. Congress knew that criminal aliens were highly likely to reoffend, and thus were likely to pose a danger to the community; but that generalization does not apply to individuals who have resided in the community for prolonged periods of time since their release from criminal custody and now

have a track record of law-abiding conduct. As the First Circuit has explained:

> It is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks. The affected aliens are individuals who committed an offense, and were released from custody for that offense, more than a decade ago. They have continued to live in the United States. By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.

Saysana, 590 F.3d at 17-18.

Amici's experience reflects that same intuition. Non-citizens who have resided in the community for prolonged periods of time since release often develop significant ties to the community, such as families and employment, that can reduce the likelihood of danger and flight. Their post-release track record allows for an individualized assessment of such risks. Accordingly, the Ninth Circuit's ruling, which calls for the individualized assessment of flight risk and dangerousness in such circumstances, correctly interpreted Section 1226(c) in light of congressional intent.

II. The Ninth Circuit's Interpretation Enhances, Rather Than Hampers, DHS's Authority to Detain Criminal Aliens.

The Government argues that the Ninth Circuit's interpretation of Section 1226(c) undermines DHS's

authority to detain criminal aliens and rewards criminal aliens with the possibility of release for DHS's failure to immediately arrest them. *See* Petr. Br. 8-9. The opposite is true. The Ninth Circuit's interpretation enhances governmental authority by giving DHS discretion and flexibility to shape its detention decision to the circumstances, including the authority to deny release or set a high bond when individualized review finds flight risk or danger. An expansive interpretation of the mandatory detention provision, by contrast, takes away that discretion and, under some circumstances, can force DHS to take measures contrary to congressional objectives, the public interest, and its own enforcement imperatives.

A. The Ninth Circuit's Interpretation Does Not Reduce DHS's Authority or Meaningfully Increase Its Burden to Detain.

Mandatory detention under Section 1226(c) does not provide the Government with any more authority than discretionary detention under Section 1226(a). In either case, DHS may detain persons who qualify as criminal aliens under the statute, through their removal proceedings. Nor is detention under Section 1226(a) meaningfully more burdensome for the Government. In Amici's experience, custody determinations and bond hearings do not take up disproportionate amounts of time or impose unworkable administrative costs on immigration officials. To the contrary, bond proceedings are generally very short. Each side states its position; there is usually no testimony when the individual is

represented by counsel, and a hearing may last fewer than ten minutes. Certainly, bond proceedings are generally no more burdensome for enforcement authorities than *Joseph* hearings, which noncitizens subject to mandatory detention are entitled to request. *See Demore*, 538 U.S. at 514 n.3.[3] Indeed, *Joseph* hearings can be quite complex—essentially a minitrial on whether the noncitizen is removable for an offense enumerated under Section 1226(c).

The main case on which the government relies, *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), underscores why the Government's position in this case is misguided. *Montalvo-Murillo* involved a claim that the Government's failure to hold a prompt bond hearing prevented the Government from detaining an arrestee altogether. The Court held that Congress did not clearly intend such a drastic outcome simply by specifying that a suspect be given a bail hearing "immediately upon the person's first appearance." *Id.* at 714 (quoting 18 U.S.C. § 3142(f) (1988)).

Here, by contrast, the Ninth Circuit's interpretation of Section 1226(c) does not cause the Government to lose any authority to detain, nor does it deprive the public of the benefit of detention. Unlike *Montalvo-*

---

[3] A *Joseph* hearing is a special appearance before an immigration judge, during which a noncitizen may challenge a mandatory detention determination by showing that the government is "substantially unlikely to succeed" in establishing that his or her criminal conviction falls within the categories subject to mandatory detention under the statute. *See Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999).

Murillo, the statute at issue here authorizes the government to detain in two ways—in its discretion upon a showing of danger and flight risk, 8 U.S.C. § 1226(a), and mandatorily, *id.* § 1226(c). The question thus is *not* whether Congress intended to strip DHS of its power to detain merely because a criminal alien was not detained when released from criminal custody—certainly, it did not. Rather, the question is whether Congress intended its categorical judgment in favor of detention to apply even in circumstances where DHS has a post-release track record on which it can base an individualized detention decision. *Montalvo-Murillo* is beside the point.

B. The Government's Interpretation In Fact Limits, Rather Than Maximizes, DHS's Authority.

The experience of Amici is that interpreting Section 1226(c) to apply even to noncitizens who have resided in the community for prolonged periods of time since their release from criminal custody would result in the detention of many individuals who pose no danger to the community and are not flight risks, and whom Congress had no interest in detaining.

Preserving the government's capacity to make individualized decisions unless specifically forbidden by Congress is important to the effective administration of the immigration laws. Noncitizens with criminal convictions frequently go on to live law-abiding lives and develop significant community ties following their release from criminal custody. They may marry and have children, obtain stable employment or further education, complete drug treatment programs, and

serve as caregivers for ill or disabled family members. Some become ill and disabled themselves. Moreover, for some, their offense of conviction reflects mistakes of youth rather than the beginning of a criminal career. That is particularly so, for example, for minor drug possession convictions that nevertheless can qualify an individual for mandatory detention. Many individuals, once released into the community for a prolonged period, will never reoffend. Where these circumstances exist, these are precisely the kinds of circumstances that must be taken into account in the effective management of detention resources.

Certainly, many criminal aliens *do* pose a threat to the community or a risk of flight, and Congress reasonably provided immigration officials with the authority to detain such persons. But Congress did not compel the government to ignore the equities of individual cases when a post-release track record allows the Government to make a reliable, individualized assessment of danger and flight risk.

Indeed, the Government's overbroad interpretation of Section 1226(c) risks frustrating immigration enforcement efforts, contrary to Congress' intent. Not only would DHS be required to detain many individuals whom it has no immigration-enforcement interest in detaining, but DHS would also be hamstrung from making rational detention decisions when operating detention facilities at capacity. In such circumstances, the Government's interpretation could require DHS to release an individual who is a danger to the public or a flight risk, but is not subject to mandatory detention, in order to make room for an individual who poses no

danger or flight risk in light of a prolonged post-release presence in the community, but who nevertheless has a conviction that qualifies for mandatory detention. For example, DHS could be forced to release a recent undocumented arrival who has no fixed address and thus is likely to abscond upon release; or a known gang member who has not been charged with any criminal conduct, and thus is not subject to mandatory detention; or even another criminal alien whose offenses fall outside the categories set forth in Section 1226(c)(1), but who nevertheless poses a danger if released. Congress did not intend to force DHS or other immigration officials to abandon high priority detentions in order to make room for individuals whose dangerousness or flight risk could be reasonably ascertained based on a track record following release from criminal custody.

In the recent past, DHS has in fact bumped up against capacity constraints and has been forced to release detainees who, presumably, had previously been found at bond hearings to warrant detention. In February 2013, eleven Immigration and Customs Enforcement ("ICE") Field Offices had detention populations in excess of their budget targets.[4] Initially, ICE responded by "transferring funding from other programs"—an unsustainable strategy that "leaves

---

[4] These included Atlanta, Chicago, Houston, Miami, New Orleans, Newark, Philadelphia, Phoenix, San Antonio, San Diego, and San Francisco. U.S. Dep't of Homeland Security, Office of Inspector General, *ICE's Release of Immigration Detainees* 32 (Aug. 2014), http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

ICE with inadequate resources" for other enforcement activities.[5] Eventually, ICE began releasing detainees it previously had determined should be detained. Between February 9, 2013, and March 1, 2013, ICE released 2,226 such immigration detainees.[6]

This situation may recur on a regular basis when, on any given day, ICE is forced to make a determination to release someone who is subject to discretionary detention under Section 1226(a), but whom ICE believes presents a flight risk or danger, because ICE needs to create space for individuals who fall under the Government's expansive interpretation of Section 1226(c). And this situation may yet repeat itself on a wide scale, as well, if ICE runs out of detention beds in the event of a surge in the number of undocumented persons crossing illegally into the United States.

Accordingly, even if the text of Section 1226(c) were ambiguous when read in isolation, the Court should not interpret the provision in a way that, when applied in reality, would force DHS to take steps directly contrary to Congress's overriding objective of preventing noncitizens from committing crimes or absconding while their removal proceedings were pending. Congress did not intend to make a categorical judgment requiring the detention of noncitizens who have a demonstrated post-release track record of law-abiding conduct and significant community ties.

---

[5] *Id.* at 1.

[6] *Id.*

CONCLUSION

The Court should affirm the decision of the Ninth Circuit.

August 13, 2018

Respectfully submitted,

MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
202-639-6873
mprice@jenner.com

Counsel for Amici Curiae

No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,

v.

MONY PREAP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

CHRISTOPHER J. HAJEC
Counsel of Record
ELIZABETH A. HOHENSTEIN
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The "When The Alien Is Released" Clause Of 8 U.S.C. § 1226(c)(1) Is Not Surplusage. 3

II. Respondents' Interpretation Of "When The Alien Is Released" Is Not Supported By The Purpose Or Legislative History Of IIRAIRA. 5

A. IIRAIRA: Tightening Control, Closing Loopholes, and Preventing Windfalls. 5

B. The Legislative History of § 1226(c) and Congress's Concern That Criminal Aliens Be Detained. 7

C. The Transition Period Custody Rules Rulemaking Process Supports a Finding that the "When The Alien Is Released" Clause Has Been Properly Interpreted by the Board Of Immigration Appeals. 8

III. DHS Often Lacks The Ability To Accomplish Immediate Detention Of An Alien Under § 1226(c) Because State And Local Cooperation Is Withheld. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Arizona Dream Act Coal. v. Brewer,
818 F.3d 101 (9th Cir. 2016) 1

Castaneda v. Souza,
810 F.3d 15 (1st Cir. 2015) 3

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 10

Demore v. Kim,
538 U.S. 510 (2003) 7, 8

Gordon v. Lynch,
842 F.3d 66 (1st Cir. 2016) 3

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 10

Hosh v. Lucero,
680 F.3d 375 (4th Cir. 2012) 3

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 7

Kokoszka v. Belford,
417 U.S. 642 (1974) 10

Lora v. Shanahan,
804 F.3d 601 (2d. Cir. 2015) 3, 13

Matter of Agour,
26 I. & N. Dec. 566 (B.I.A. 2015) 5

Matter of Arreola,
25 I. & N. Dec. 267 (B.I.A. June 23, 2010) 4

Matter of C-T-L-,
25 I. & N. Dec. 341 (B.I.A. 2010) 1

Matter of Noble,
21 I. & N. Dec. 672 (B.I.A. 1997) 9, 10

Matter of Rojas,
23 I. & N. Dec. 117 (B.I.A. 2001) 3, 9, 13

Matter of Silva-Trevino,
26 I. & N. Dec. 826 (B.I.A. 2016) 1

In re N-J-B-,
21 I. & N. Dec. 812 (B.I.A. 1997) 6

Ofosu v. McElroy,
98 F.3d 694 (2d Cir. 1996) 10

Olmos v. Holder,
780 F.3d 1313 (10th Cir. 2015) 3

Philbrook v. Glodgett,
421 U.S. 707 (1975) 10

Save Jobs USA v. U.S. Dep't of Homeland Sec.,
No. 16-5287 (D.C. Cir., filed Sept. 28, 2016) 1

Sylvain v. Att'y Gen. of the United States,
714 F.3d 150 (3d Cir. 2013) 3

Trump v. Hawaii,
No. 17-17168 (S. Ct. argued Apr. 25, 2018) 1

United States v. Boisdore's Heirs,
49 U.S. (8 How.) 113 (1850) 5

United States v. Texas,
136 S. Ct. 2271 (2016) 1

Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.,
74 F. Supp. 3d 247 (D.D.C. 2014) 1

Wong Wing v. United States,
163 U.S. 228 (1896) 7

CONSTITUTION

U.S. Const. art. VI, cl. 2 13

STATUTES AND REGULATIONS

6 U.S.C. § 202(3) 2

8 C.F.R. § 236.1(c)(8) 8

8 U.S.C. § 1101(a)(13)(A) 5

8 U.S.C. § 1182(a)(9)(B) 6

8 U.S.C. § 1182(c) (repealed 1996) 6

8 U.S.C. § 1226(a)(1)(A)-(D) 9

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1226(c)(1) 2, 3, 4

8 U.S.C. § 1226(c)(1)(A)-(D) 4, 13

8 U.S.C. § 1226(d) 11, 13

8 U.S.C. § 1229b(a) 6

8 U.S.C. § 1229b(b) 6

8 U.S.C. § 1231(a)(2) 4

8 U.S.C. § 1231(a)(4)(A) 4

8 U.S.C. § 1357(g)(10) 11

Cal. Gov't Code § 7282.5(a) 12

Cal. Gov't Code § 7284.6(a)(4) 12

IIRAIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 3009-575 (1996) 5, 6

IIRAIRA, Pub. L. 104-208, § 301, 110 Stat. 3009, 3009-576 6

IIRAIRA, Pub. L. No. 104-208, § 303, 110 Stat. 3009, 3009-585 (1996) 5

IIRAIRA, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009 9

IIRAIRA, Pub. L. 104-208, § 304, 110 Stat. 3009, 3009-594 6

OTHER AUTHORITIES

H.R. Rep. No. 104-469 (1995) 7, 8

Madison Park, *ICE blasts Oakland mayor over her warning. She stands by her decision*, CNN (Mar. 1, 2018), https://www.cnn.com/2018/02/28/us/oakland-mayor-libby-schaaf-ice-arrests/index.html 14

Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Services and for the Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27441 (May 19, 1998) 9, 10

Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws, Federation for American Immigration Reform 1 (2018) 12

S. Rep. 104-48 (1995) 6, 7, 12

S. Rep. No. 104-249 (1996) 2

S. Rep. No. 104-429 (1996) 11

INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, No. 17-17168 (S. Ct. argued Apr. 25, 2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF THE ARGUMENT

"No matter how successful Congress might be in crafting a set of immigration laws that would—in theory—lead to the most long-term benefits to the

---

[1] Petitioners and Respondents have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

American people, such benefits will not occur if those laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996). Title 8 U.S.C. § 1226(c)(1) requires that the Department of Homeland Security ("DHS")[2] take custody of certain criminal aliens "when the alien is released . . . ." In § 1226(c), Congress crafted an immigration law to protect the American people from criminal aliens. Now, Respondents seek to erode Congress's command that certain classes of criminal aliens are subject to mandatory detention by placing a limit on the time DHS has to take custody of such aliens. While immediacy is to be preferred, it is not required by the statute's language or history.

The parties focus their arguments on the text of the statute—specifically, its "when the alien is released" clause—and competing precedent. Herein, Petitioners' arguments are supplemented by the observation that the clause referred to plays a vital role in the statute under Petitioners' meaning, and is not surplusage. Additionally, the overall structure and legislative history of the Illegal Immigration and Immigrant Responsibility Act ("IIRAIRA") strongly supports the conclusion that the "when the alien is released" clause does not create an implied deadline for assuming custody. Finally, Congress's understanding that state and local jurisdictions may attempt to thwart federal officials from taking custody of criminal aliens strongly

---

[2] Congress transferred to the Secretary of the Department of Homeland Security the enforcement power of the Immigration and Nationality Act. 6 U.S.C. § 202(3). DHS, specifically U.S. Immigration and Customs Enforcement ("ICE"), is responsible for detaining aliens under 8 U.S.C. § 1226(c).

indicates that it did not intend Respondents' interpretation.

ARGUMENT

I. The "When The Alien Is Released" Clause Of 8 U.S.C. § 1226(c)(1) Is Not Surplusage.

In *Matter of Rojas*, the Board of Immigration Appeals ("BIA") found that federal immigration authorities do not lose the ability to detain an alien subject to mandatory detention even if the alien is not taken into custody immediately. 23 I. & N. Dec. 117, 127 (B.I.A. 2001). Among the courts of appeals, only the court below has reached a conclusion opposite to that of the BIA.[3]

Respondents argue that the "when the alien is released" clause cannot be read merely as stating the earliest point at which DHS may take criminal aliens into custody because such a reading would render the clause mere surplusage, serving no purpose. Br. in Opp'n to Pet. for Cert. 23-24. But the flaw in this argument is obvious. If the clause were indeed superfluous, it could be taken out without change to the meaning of the statute—and such is far from the case. Without this clause, DHS could attempt to gain custody of an alien immediately rather than waiting for

---

[3] *See Lora v. Shanahan*, 804 F.3d 601, 610 (2d. Cir. 2015); *Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 157 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313, 1316 (10th Cir. 2015), *but see Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (evenly divided); *Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016) (remanding back to the district court).

release from a non-DHS custodian.[4] Indeed, if the "when the alien is released" clause were eliminated from the section, subsection (1) would command the Secretary to take custody "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." Respondents have taken for granted that without the "when the alien is released" clause, DHS would assume that it could only take custody after the alien is released from non-DHS custody. On the contrary, reading subsection (1) without the "when the alien is released" clause seems to give DHS full rein to take custody of an alien before such time, and every reason to conclude that Congress has mandated, by using the word "shall," that DHS take custody regardless of whether another entity currently has custody. The "when the alien is released" clause is thus necessary to clarify that immigration officials cannot simply demand custody, at any time, of an alien who has committed a requisite offense. *See Matter of Arreola*, 25 I. & N. Dec. 267, 269 (B.I.A. June 23, 2010) (clarifying that mandatory detention of a criminal alien does not accrue until he or she is released from non-DHS custody for an offense listed in § 1226(c)(1)(A)-(D)). In other words, the clause does exactly what Petitioners assert: it triggers DHS's control over the alien.

---

[4] As Petitioners point out, this clause thus brings § 1226(c)(1) into harmony with other INA provisions regarding when DHS may take custody of an alien. 8 U.S.C. § 1231(a)(2), (a)(4)(A); Pet'rs' Br. 18.

II. Respondents' Interpretation Of "When The Alien Is Released" Is Not Supported By The Purpose Or Legislative History Of IIRAIRA.

A. IIRAIRA: Tightening Control, Closing Loopholes, and Preventing Windfalls.

The current iteration of the mandatory detention statute for criminal aliens was passed in 1996 as part of IIRAIRA. IIRAIRA, Pub. L. No. 104-208, § 303, 110 Stat. 3009, 3009-585 (1996). Where the statutory language itself does not answer the question of how a statute should be interpreted, courts may look to the act as a whole to decipher what Congress's intent was. *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its objects and policy."). Specific provisions either altered or added by IIRAIRA show a clear intent to discourage illegal immigration and to prevent criminal aliens from taking advantage of our immigration system.

IIRAIRA added several provisions to discourage both illegal immigration and criminal activity. Arguably, the most sweeping and fundamental change of IIRAIRA was replacing presence and entry into the United States with the stricter lawful admission requirement. Before IIRIRA, entry was statutorily defined as the "coming of an alien into the United States, from a foreign port or place or from an outlying possession." *Matter of Agour*, 26 I. & N. Dec. 566, 571-72 (B.I.A. 2015) (citation omitted). IIRIRA § 301 replaced that definition of entry with the new definition of admission, 8 U.S.C. § 1101(a)(13)(A),

which excludes persons whose presence in the United States is unauthorized. IIRAIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 3009-575 (1996).

The second change made by IIRAIRA was to create penalties for unlawful presence to ensure that aliens did not receive a windfall for eluding immigration officials. Specifically, Congress created the three- and ten-year bars under 8 U.S.C. § 1182(a)(9)(B). These provisions prevent aliens who accrue unlawful presence in the United States and then depart from re-entering the country for either three or ten years, depending upon how long they were unlawfully present in the United States. IIRAIRA, Pub. L. 104-208, § 301, 110 Stat. 3009, 3009-576. This change conveyed a strong message that unlawful presence itself, regardless of any other unlawful action, now would be detrimental to future admission.

One final example of Congress' intent to ensure the American people were protected from criminal aliens was the elimination of relief under INA § 212(c), the most common type of relief sought by criminal aliens at the time, and the promulgation of cancellation of removal under 8 U.S.C. § 1229b(a) & (b). IIRAIRA, Pub. L. 104-208, § 304, 110 Stat. 3009, 3009-594; S. Rep. 104-48, at 28 (1995). These provisions prevented an alien from seeking cancellation of removal for certain offenses, such as the newly broadened categories of aggravated felonies and other criminal acts. "Congress clearly intended to limit the categories of undocumented aliens eligible for such relief and to limit the circumstances under which any relief may be granted." *In re N-J-B-*, 21 I. & N. Dec. 812, 813 (B.I.A. 1997). While not an exhaustive list,

these three changes from IIRAIRA represent Congress's intent to improve our immigration laws to close loopholes and prevent windfalls from being exploited by illegal and criminal aliens. A Congress with such an intent would not have also intended, in a phrase that is at best ambiguous, to reward aliens simply because they had eluded capture by DHS.

B. The Legislative History of § 1226(c) and Congress's Concern That Criminal Aliens Be Detained.

Where the statutory language is unclear and open to multiple interpretations, legislative history is a useful tool in deciphering Congress's intent. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The immigration laws of this country have always included detention provisions, and this Court has upheld detention as a facet of immigration enforcement. "[Detention] . . . as part of the means necessary to give effect to the provisions for the [removal] of aliens would be valid. Proceedings to [remove] would be in vain if those accused could not be held in custody pending the inquiry into their true character . . . ." *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

In 1996, Congress noted that the requirements of the current immigration laws were not being met, and specifically referenced the delays and abuses of deportation processes by criminal aliens. S. Rep. No. 104-48, at 12, 26. IIRAIRA was passed due to the "wholesale failure by INS to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003); H.R. Rep. No. 104-469, at 123 (1995). At that time, 20% of criminal aliens absconded. S. Rep. No. 104-48, at 1. Additionally, criminal aliens who

remain at large in the U.S. tend to commit more crimes before finally being removed. *Demore v. Kim*, 538 U.S. at 518. Against this background, Congress noted that the use of bond by the agency was a hurdle to removing criminal aliens. H.R. Rep. 104-469, at 124.

With these concerns setting the scene for IIRAIRA's passage, Congress determined that certain criminal aliens should not go before an Immigration Judge ("IJ") for a bond hearing. Under 8 C.F.R. § 236.1(c)(8), when bond determinations are made, the alien must show that "release would not pose a danger, . . . and that the alien is likely to appear for any future proceeding." Here, Congress weighed these exact concerns—future danger and the likelihood to appear—to find that the risks that criminal aliens pose were too great to subject the American people to them, and so determined that case-by-case bond determination for certain criminal aliens was inappropriate. Respondents' attempt to amend this determination by making an exception for aliens who are able to evade ICE flies in the face of Congress's clear intent to take bond decisions out of the hands of IJs.

C. The Transition Period Custody Rules Rulemaking Process Supports a Finding that the "When The Alien Is Released" Clause Has Been Properly Interpreted by the Board Of Immigration Appeals.

When Congress passed IIRAIRA, it recognized that detention space and personnel were not available for the full implementation of the immigration statutes. The Transition Period Custody Rules ("TPCR") were intended to provide a stopgap for the mandatory detention of certain, more narrowly-defined classes of

criminal aliens. IIRAIRA, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009, 3009-586-87. Importantly, TPCR contains the identical clause at issue in this case, "when the alien is released."

The BIA analyzed the meaning of the "when the alien is released" clause in TPCR in *Matter of Noble*, 21 I. & N. Dec. 672 (B.I.A. 1997). The Board concluded that the clause modified the "Attorney General shall take into custody" language and "specifies the time at which that duty arises." *Id.* at 680. This conclusion aligns with the Board's later decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001) (holding, under *Chevron*, that the language "when the alien is released" is ambiguous and determining that if an alien is not taken into immediate custody by the agency, § 1226(c) can still apply to those aliens categorized in § 1226(a)(1)(A) – (D)).

On May 19, 1998, the Immigration and Naturalization Service ("INS")[5] and the Executive Office for Immigration Review ("EOIR") promulgated a final rule detailing the procedures for TPCR. Recognizing the important effects these rules had on the safety of the country, Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Services and for the Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27441, 27441 (May 19, 1998), the final rule noted that mandatory detention for some criminal aliens is needed because their risk of absconding is great, and when an alien

---

[5] The responsibilities of INS have been taken over by DHS, specifically, ICE.

absconds, "INS lacks the resources to conduct a dragnet," *id.* at 27442 (citing *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996)). The agencies thus found that mandatory detention minimizes the waste of government resources. *Id.* at 27443. Importantly, the final rule briefly discussed the meaning of "when the alien is released." Certain commentators had suggested that the "when the alien is released" clause only applies to criminal aliens released directly from incarceration, but this conclusion was rejected. *Id.* at 27447. Instead, INS and EOIR threw their weight behind the BIA's determination in *Matter of Noble*, which found that the clause specified when the Attorney General's duty to take a criminal alien into custody arises. *Id.*

Courts are to construe a term or phrase consistently throughout an act or body of law, rather than treat its instances as isolated provisions to be independently analyzed. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 561 (1995) (citing *Philbrook v. Glodgett*, 421 U.S. 707 713 (1975)); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). On this principle, this Court would be hard-pressed not to afford *Chevron* deference to two agencies that have found in favor of Petitioners' conclusion. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844-45 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

III. DHS Often Lacks The Ability To Accomplish Immediate Detention Of An Alien Under § 1226(c) Because State And Local Cooperation Is Withheld.

Consultation between federal and state officials is an important feature of our immigration system. Throughout the Immigration and Nationality Act ("INA"), there is evidence that Congress envisioned a federal and state partnership aimed at curbing illegal immigration and keeping our country safe.

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and Local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of Immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-429, at 19-20 (1996). For example, 8 U.S.C. § 1357(g)(10) permits state and local officials to communicate and cooperate with ICE "in the identification, apprehension, detention, or removal of aliens . . . ."

Section 1226 even acknowledges that the identification of criminal aliens relies on state and local law enforcement cooperation. Under § 1226(d), the government is instructed by Congress to implement an open communications system to determine if individuals who commit qualifying aggravated felonies are aliens, and thus could be detained under § 1226(c). Congress understood that the success of § 1226(c)'s

mandatory detention provision was dependent upon state and local officials; and Congress was willing to devote the necessary resources to that relationship for it to flourish.

While Congress envisioned a seamless relationship between federal and state and local officials working towards the common goal of detaining criminal aliens, even at the time IIRAIRA was passed, some jurisdictions had worked to demolish this relationship. S. Rep. No. 104-48, at 2 ("To make matters even more difficult for immigration officials, some local communities have adopted official policies of non-cooperation with the INS. Public employees in these communities are prohibited from providing information to the INS or cooperating with the INS in most circumstances."). Since then, many jurisdictions have put their own citizens at risk by passing legislation limiting cooperation with federal immigration officials. In 2000, only 11 such jurisdictions existed.[6] In 2018, there are approximately 564 jurisdictions that in some way curb or prohibit cooperation between state and local officials and DHS.[7] One of the most egregious examples is California's SB 54, which prohibits the sharing of aliens' release dates, and their personal information, with DHS, and goes so far as to forbid the transfer of custody of aliens to ICE. Cal. Gov't Code §§ 7284.6(a)(4), 7282.5(a).

---

[6] *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, Federation for American Immigration Reform 1, 1 (2018) (providing a report on the number of sanctuary city jurisdictions in the United States).

[7] *Id.*

As explained above, DHS often relies on state and local jurisdictions to communicate basic information about criminal aliens subject to mandatory detention under § 1226(c). Considering that Congress, through statute, specifically acknowledged that detaining criminal aliens would be dependent upon local law enforcement's cooperation, and even devoted § 1226(d) to facilitating communication, it is unlikely that the "when . . . released" clause was intended to require immediate or even prompt detention by DHS. As the BIA put it, "it is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Matter of Rojas*, 23 I. & N. Dec. at 128; *Lora v. Shanahan*, 804 F.3d at 612-13. Indeed, this technique for gaining custody of an alien is the exact "dragnet" technique Congress was looking to avoid with TPCR and § 1226(c).

A requirement of promptness or immediacy, moreover, would only allow jurisdictions such as California to deprive § 1226(c) of its intended effect, thus augmenting such jurisdictions' (already unconstitutional and preempted, U.S. Const. art. VI, cl. 2) interference with federal immigration enforcement. For example, an alien who was confined in Oakland, California, for a violation that falls under § 1226(c)(1)(A)-(D) could evade detention by ICE because California forbids the transfer of custody to ICE. Such an alien might further evade ICE detention by benefiting from the public warning Oakland's mayor Libby Schaaf gave of an impending ICE raid in the

area.[8] Under the Respondents' interpretation, the alien's evasion of ICE, with the help of state and local officials, for a long enough period of time would prevent ICE from taking custody and applying the mandatory detention provisions of §1226(c). Thus empowering jurisdictions to engage in unconstitutional interference with federal immigration enforcement even more than they already do is not a result it is plausible Congress envisioned, nor one that should be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the judgement of the court below should be reversed.

Respectfully submitted,

CHRISTOPHER J. HAJEC
Counsel of Record
ELIZABETH A. HOHENSTEIN
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae

---

[8] *See* Madison Park, *ICE blasts Oakland mayor over her warning. She stands by her decision*, CNN (Mar. 1, 2018), https://www.cnn.com/2018/02/28/us/oakland-mayor-libby-schaaf-ice-arrests/index.html.

No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

MONY PREAP, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

GEOFFREY H. YOST
WARD A. PENFOLD
DIANA ROGOSA
ALEXA GRAUMLICH
ERIC ORMSBY
MARISSA RHOADES
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

JAYASHRI SRIKANTIAH
(Counsel of Record)
jsrikantiah@law.stanford.edu
JENNIFER L. STARK
IMMIGRANTS' RIGHTS CLINIC
MILLS LEGAL CLINIC
STANFORD LAW SCHOOL
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. CONGRESS ENACTED SECTION 1226(c) TO ENSURE THAT CERTAIN NONCITIZENS ARE TRANSFERRED DIRECTLY FROM CRIMINAL CUSTODY TO IMMIGRATION CUSTODY 4

A. Legislative History Demonstrates That Congress Intended Mandatory Detention to Ensure Continuous Custody of Certain Noncitizens from Their Release from Criminal Custody to Potential Removal 5

B. Congress's Prospective Application of Section 1226(c) and Modest Appropriations for Detention Bed Space Are Consistent with its Narrow Goal of Ensuring Continuous Custody of Certain Noncitizens 14

TABLE OF CONTENTS
(continued)

Page

C. After IIRIRA, Congress Considered and Rejected Numerous Proposed Amendments That Would Have Dramatically Expanded the Scope of Section 1226(c) to Apply to All Noncitizens Convicted of a Predicate Offense 18

II. THE STRUCTURE OF SECTION 1226(c) AND ITS PREDECESSOR STATUTES CONFIRMS CONGRESS'S NARROW GOAL FOR MANDATORY DETENTION 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

DeMelo v. Cobb,
936 F. Supp. 30 (D. Mass. 1996),
vacated as moot after IIRIRA's passage, 108 F.3d 328 (1st Cir. 1997) 22

Demore v. Kim,
538 U.S. 510 (2003) 7

Forest Grove Sch. Dist. v. T. A.,
557 U.S. 230 (2009) 11

Goldings v. Winn,
383 F.3d 17 (1st Cir. 2004) 11

In re Adeniji,
22 I. & N. Dec. 1102 (BIA 1999) 15

INS v. St. Cyr,
533 U.S. 289 (2001) 14

Isaacs v. Bowen,
865 F.2d 468 (2d Cir. 1989) 10

Matter of Eden,
20 I. & N. Dec. 209 (BIA 1990) 9, 22

Matter of Patel,
15 I. & N. Dec. 666 (BIA 1976) 5

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,
135 S. Ct. 2507 (2015) 11

United States v. Calamaro,
354 U.S. 351 (1957) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Villagomez v. Smith, No. 96-1141, 1996 WL 622451, at *2 (W.D. Wash. July 31, 1996) 22

STATUTES

8 U.S.C. § 1101(a)(43) 6, 15

8 U.S.C. § 1101(a)(43)(F), (G), (M), (Q), & (T) 15

8 U.S.C. § 1226(a) (1996) 5

8 U.S.C. § 1226(c) ..... *passim*

8 U.S.C. § 1226(c)(1) ..... *passim*

8 U.S.C. § 1226(c)(1)-(2) 2

8 U.S.C. § 1226(c)(2) 22

8 U.S.C. § 1226(d)(1)(B) (1996) 8

8 U.S.C. § 1231(a)(5) 13

8 U.S.C. § 1252(a) (1952) 5

8 U.S.C. § 1252(a)(1) (1989) 5, 6

8 U.S.C. § 1252(a)(1) (1991) 5

8 U.S.C. § 1252(a)(1) (1996) 5, 12, 13

8 U.S.C. § 1252(a)(2) (1989) 6, 21

8 U.S.C. § 1252(a)(2) (1991) 9, 10, 21

8 U.S.C. § 1252(a)(2) (1996) 21

8 U.S.C. § 1252(a)(2)(A) (1991) 10

8 U.S.C. § 1252(a)(3)(A)(ii) (1989) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1252(a)(3)(A)(ii) (1991) 8

8 U.S.C. § 1252(a)(3)(A)(ii) (1996) 8

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 6

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 11, 15

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... *passim*

Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978 9

OTHER AUTHORITIES

134 Cong. Rec. 32649 (1988) 7

136 Cong. Rec. 35621 (1990) 8

137 Cong. Rec. 17,550 (1991) 12

142 Cong. Rec. 27216 (1996) 13

142 Cong. Rec. S10572–01 (daily ed. Sept. 16, 1996), 1996 WL 522794 13

Cong. Research Serv., Library of Congress, RS52, *Anti-Drug Abuse Act of 1988 (P.L. 100-690): Summary of Major Provisions* (1989) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Criminal Aliens, Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary, 103rd Cong. 1, Serial No. 37 (1994) 9

Criminal Aliens, Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, 101st Cong. 54 (1989) 7

Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1999, Hearings Before a Subcomm. of the S. Comm. on Appropriations, 105th Cong. 172 (1998) 18

H.R. 1901, 113th Cong. (2013) 19

H.R. 2278, 113th Cong. (2013) 19

H.R. Rep. 104–469(I) (1996), 1996 WL 168955 ..... 13, 23

H.R. Rep. 112–255 (2011) 19, 20

H.R. Rep. No. 101-681(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472 ..... 8, 9

Keep Our Communities Safe Act, Hearing on H.R. 1932 Before the Subcomm. on Immigration Policy and Enf't of the Comm. on the Judiciary, 112th Cong. 24 (2011) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 104th Cong. 15, Serial No. 103 (1996) 16, 17

Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 104th Cong. 29, Serial No. 15 (1995) 17

S. 1640, 114th Cong. (2015) 19

S. 2463, 113th Cong. (2014) 19

S. 291, 114th Cong. (2015) 19

INTEREST OF AMICI CURIAE[1]

Amici curiae served as members of the U.S. Congress during the consideration and passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and its mandatory detention provision, 8 U.S.C. § 1226(c). *Amici* are in a unique position to describe the intended scope of IIRIRA's detention mandate. Several *amici* served on key congressional committees that heard testimony and considered proposals that culminated in the passage of IIRIRA. All *amici* voted on the passage of IIRIRA. As people who have dedicated much of their lives to public service, *amici* share a strong interest in the just enforcement of the nation's immigration laws.

Amici are the following current and former members of Congress, listed in alphabetical order and (for the House) by district at the time of IIRIRA's passage:

1. Fmr. Rep. Howard Berman (Calif., 26th Dist.)
2. Fmr. Rep. Rick Boucher (Va., 9th Dist.)
3. Fmr. Rep. John Bryant (Tex., 5th Dist.)
4. Fmr. Sen. Russell Feingold (Wis.)
5. Fmr. Rep. Barney Frank (Mass., 4th Dist.)
6. Rep. Sheila Jackson Lee (Tex., 18th Dist.)
7. Rep. Zoe Lofgren (Calif., 16th Dist.)

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by a written consent of all parties.

8. Rep. Jerrold Nadler (N.Y., 8th Dist.)
9. Fmr. Rep. Patricia Schroeder (Colo., 1st Dist.)
10. Rep. José E. Serrano (N.Y., 16th Dist.)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief as current and former members of Congress to clarify important aspects of the legislative history behind the mandatory detention provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

Amici agree with Respondents that the text of Section 1226(c) is unambiguous: paragraph (1) provides that, "when the alien is released" from criminal custody, the "Attorney General shall take [the alien] into [immigration] custody," and paragraph (2) applies the detention mandate only to the "alien described in paragraph (1)[.]" 8 U.S.C. § 1226(c)(1)-(2). The plain language of Section 1226(c) applies mandatory detention to only those noncitizens who are apprehended by the Department of Homeland Security (DHS) *when they are released* from criminal custody. For all noncitizens not covered by this narrow carve-out—including many of the Respondent class members who have long ago completed their sentences and now are reintegrated peacefully into society—the agency retains full discretion to make arrest and detention determinations pending removal, subject to the procedures set forth in Section 1226(a).

Amici file this brief to make two points relating to the legislative history of Section 1226(c). Both points

respond to the government's argument that the detention mandate bears no connection to the timing of a noncitizen's release from criminal custody.

First, in enacting mandatory detention, Congress had in mind a specific, narrow objective: to maintain continuous custody over noncitizens convicted of certain crimes who are placed into removal proceedings when they are released from criminal custody. That is why Section 1226(c) requires the immigration agency to take custody of noncitizens convicted of certain enumerated offenses when they are released from criminal custody and then retain custody of these same noncitizens pending resolution of their removal proceedings.

Respondents' case presents a related but different issue: whether and how to detain noncitizens who are *not* taken into immigration custody at the time of their release from criminal custody. Many of the Respondent class members have served their time and become contributing members of society. Their lives present myriad individual circumstances, including caregiving and parenting for U.S. citizen family and ongoing employment and community ties. So Congress did not mandate a "one size fits all" detention policy. Rather, Congress preserved immigration authorities' long-standing discretion to determine whether to detain these noncitizens living peacefully in the community, since their post-release conduct provides a basis for assessing flight risk and dangerousness.

Second, IIRIRA's structure refutes the government's theory that mandatory detention applies to all

noncitizens convicted of the specified offenses, without regard to whether they were taken into immigration custody when released from criminal custody. Each iteration of mandatory detention—through four versions of the statute—followed the same pattern, requiring that the agency (1) take custody of noncitizens with certain convictions when they are released from criminal custody, and then (2) retain custody of those same noncitizens thereafter. This structure accords with Congress's purpose in enacting Section 1226(c): to maintain continuous custody over noncitizens with certain specified convictions—from criminal custody to immigration detention to potential removal.

The Court should reject the government's interpretation of Section 1226(c) and reaffirm the statute's plain textual directive that mandatory detention applies only to noncitizens convicted of predicate offenses who were taken into immigration custody when they were released from criminal custody.

ARGUMENT

I. CONGRESS ENACTED SECTION 1226(c) TO ENSURE THAT CERTAIN NONCITIZENS ARE TRANSFERRED DIRECTLY FROM CRIMINAL CUSTODY TO IMMIGRATION CUSTODY

Congress enacted mandatory detention for the first time in 1988. Congress sought to address concerns about certain noncitizens being allowed back into the community when they were released from criminal custody. Congress's solution to this specific and narrow problem was to mandate that immigration authorities take custody of noncitizens convicted

of aggravated felonies at the time of their release from criminal custody and then retain custody of them pending removal. Congress thus ensured a continuous chain of custody from criminal custody to immigration detention through to the completion of removal proceedings. This remained Congress's goal for mandatory detention from 1988 through IIRIRA's passage in 1996.

For all other individuals not covered by mandatory detention—including those like Respondent class members who were already released from criminal custody and reintegrated into the community—Congress provided federal immigration officials discretion to decide whether to release them on bond. *See* 8 U.S.C. § 1252(a)(1) (1989); 8 U.S.C. § 1252(a)(1) (1991); 8 U.S.C. § 1252(a)(1) (1996); 8 U.S.C. § 1226(a) (1996). Eligibility for release on bond has long been the default in the immigration detention system. Prior to 1988, all detained noncitizens were eligible for release on bond. *See* 8 U.S.C. § 1252(a) (1952); *Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) (noncitizens were "not [to] be detained" unless found to be a danger or a flight risk).

A. Legislative History Demonstrates That Congress Intended Mandatory Detention to Ensure Continuous Custody of Certain Noncitizens from Their Release from Criminal Custody to Potential Removal

From the initial enactment of mandatory detention in 1988 through IIRIRA's passage in 1996, Congress consistently focused on the narrow category of

noncitizens transferred directly from criminal custody to immigration custody. Contrary to the government's submission, there is nothing in the legislative history indicating that Congress sought to address through mandatory detention the separate and distinct issue of detaining noncitizens who were released from criminal custody and reintegrated into society.

1. When Congress first enacted mandatory detention through the Anti-Drug Abuse Act of 1988,[2] it focused on only noncitizens convicted of "aggravated felonies"[3] and transferred directly from criminal custody to immigration detention. 8 U.S.C. § 1252(a)(2) (1989) ("[T]he Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion* of the alien's sentence for such conviction . . . [and] the Attorney General shall not release *such felon* from custody.") (emphasis added). The 1988 Act preserved federal immigration officials' long-standing discretionary authority to release all other noncitizens in removal proceedings. *See* 8 U.S.C. § 1252(a)(1) (1989).

Legislative history makes plain the problem that Congress sought to address through mandatory detention. Prior to the enactment of the 1988 Act, Congress received General Accounting Office (GAO) reports and heard testimony that some noncitizens with

---

[2] *See* Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181, 4470.

[3] The Act defined "aggravated felony" to include only noncitizens with very serious convictions—namely, murder and drug and firearms trafficking. *See* Anti-Drug Abuse Act of 1988, § 7342, Pub. L. No. 100-690, 102 Stat. at 4469-70 (codified at 8 U.S.C. § 1101(a)(43)).

criminal convictions committed additional crimes or fled after being identified as removable because they were not taken into custody upon release from criminal custody. *See, e.g., Criminal Aliens, Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 53-54, 67, Serial No. 44 (1989) (statement of GAO Directors Lowell Dodge and James Blume regarding 1986 and 1987 GAO reports submitted to Congress); *see also Demore v. Kim*, 538 U.S. 510, 518 (2003) (citing to the 1986 report and the 1989 hearing on H.R. 3333).

Congress imposed mandatory detention on noncitizens who were in criminal custody to solve that specific problem. As stated by Senator Alphonse D'Amato, upon concurrence of the Senate in the bill that was subsequently enacted into law as the Anti-Drug Abuse Act of 1988, the mandatory detention provision "requires the Federal Government to put aggravated alien felons in detention *immediately* after they serve their criminal sentence." 134 Cong. Rec. 32649 (1988) (statement of Sen. Alphonse D'Amato); *see also* Cong. Research Serv., Library of Congress, RS52, *Anti-Drug Abuse Act of 1988 (P.L. 100-690): Summary of Major Provisions* (1989) (report for Congress stating that the mandatory detention provision contained in the 1988 Act required "State and local authorities to transfer custody of such aliens [convicted of aggravated felonies] *promptly* to the Attorney General.") (emphasis added). Senator Bob Graham reiterated the purpose of the mandatory detention provision when later explaining that, "[i]n 1988, Congress . . . wrote specific guidelines for the [Immigration and Naturalization

Service (INS)]" stating that, once noncitizens convicted of aggravated felonies complete their sentences, "they must be taken into *immediate* custody by the INS." 136 Cong. Rec. 35621 (1990) (statement of Sen. Bob Graham) (emphasis added); *see also* H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554 (characterizing then-"current law"—the detention mandate set forth in the 1988 statute—as "requir[ing] [the government] to incarcerate alien aggravated felons without bond *immediately upon completion of the alien's criminal 'sentence'*") (emphasis added).[4]

2. Congress next refined the mandatory detention provision through the Immigration Act of 1990. Its focus was on ensuring that all noncitizens with certain convictions were taken into immigration custody at the time of their release from criminal custody, even if their release did not coincide with the conclusion of their criminal sentences. Congress revised the Immigration and Nationality Act (INA) to require that a noncitizen convicted of an aggravated felony be taken into immigration custody "upon release" from

---

[4] Congress's focus on taking custody of noncitizens convicted of aggravated felonies "upon completion" of their underlying sentences is further underscored by Section 1252(a)(3), which provides, among other things, that the Attorney General shall devise a system "to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and *release* of any alien charged with an aggravated felony." 8 U.S.C. § 1252(a)(3)(A)(ii) (1989) (emphasis added). This language was retained in all subsequent iterations of the mandatory detention statute. *See* 8 U.S.C. § 1252(a)(3)(A)(ii) (1991); 8 U.S.C. § 1252(a)(3)(A)(ii) (1996); 8 U.S.C. § 1226(d)(1)(B) (1996).

criminal custody, "regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (codified at 8 U.S.C. § 1252(a)(2) (1991)).

When approving this "clarification," a House report to the 1990 amendments explained that "[a]t least one immigration judge has ruled that an aggravated felon who has been paroled by the sentencing court continues to serve his 'sentence' while out on parole," thereby preventing INS from placing the noncitizen in immigration custody "until his period of parole has ended." H.R. Rep. No. 101-681(I), § 1503, at 34, 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554; *see Matter of Eden*, 20 I. & N. Dec. 209, 210 (BIA 1990). Congress amended the law to specifically "requir[e] INS to incarcerate aggravated felons *upon release from confinement*." H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554 (emphasis added). As Representative Romano Mazzoli explained, "[t]he Immigration Act of 1990 required the Immigration Service to detain all aliens convicted of aggravated felonies during the time periods between their release from prison and their deportation." *Criminal Aliens, Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary*, 103rd Cong. 1, Serial No. 37 (1994) (opening statement of Romano Mazzoli).

The government concedes that Congress's "upon release" clause in the 1990 Immigration Act directed

federal immigration officials to detain noncitizens immediately upon release from criminal custody. *See* Pet. Br. at 35 (citing to *Webster's* Dictionary for the proposition that "upon" means "immediately" or "very soon after"). Nonetheless, the government argues that the 1990 amendments applied to all noncitizens with the requisite criminal history, regardless of whether they were released from criminal custody several years prior and had since lived peacefully in society. *Id.* at 32. It is true that the Immigration Act of 1990 briefly restored discretion to "release from custody" any "lawfully admitted" noncitizen on bond, so long as the noncitizen could demonstrate that he or she did not pose a flight risk or danger to the community. *See* Immigration Act of 1990, § 504, 104 Stat. at 5049. But the provision permitting discretionary release of lawfully admitted noncitizens was an exception to the mandatory detention provision, which *did* refer to the timing of release from criminal custody. *See* 8 U.S.C. § 1252(a)(2)(A) (1991).

The government also asserts that Congress ratified an interpretation of mandatory detention that was supposedly adopted by the Executive Branch, *see* Pet. Br. at 31-33, but that is an incomplete retelling of the story. Nothing in the legislative history indicates that the regulations cited by the government—which were promulgated less than six months prior to the 1990 Act—were ever "called to the attention of Congress" and "accompanied by any congressional discussion which throws light on its intended scope." *United States v. Calamaro*, 354 U.S. 351, 359 (1957); *see also Isaacs v. Bowen*, 865 F.2d 468, 473 (2d Cir. 1989) ("to construe an agency's interpretation as Con-

gress' will we must find a manifestation of congressional approval").[5] And the broader legislative history clearly shows that it only applied to noncitizens immediately "upon release" from criminal custody, so there is no need to "look to the [agency's] interpretation" to determine the Act's meaning. *Goldings v. Winn*, 383 F.3d 17, 21 (1st Cir. 2004) (citation omitted).

3. When Congress next amended the mandatory detention provision as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it continued to refine its approach to the specific problem of ensuring that noncitizens convicted of certain offenses were transferred directly from criminal to immigration custody. Congress expanded the category of noncitizens subject to mandatory detention and instructed the Attorney General to take noncitizens into custody "upon release . . . from incarceration." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277.

During discussions leading to AEDPA's passage, Congress consistently continued to identify the problem it sought to solve: preventing certain noncitizens from being released into local communities at the end

---

[5] The government's reliance on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-20 (2015), and *Forest Grove School District v. T. A.*, 557 U.S. 230, 244 n.11 (2009), to support its argument is misplaced. *See* Pet. Br. at 33. These cases involved Congress acting in the face of known court precedent, rather than Congress acting against the backdrop of agency regulations that Congress never discussed and which conflict with the plain language and legislative history of the statute.

of criminal custody. *See, e.g.*, H.R. Rep. No. 104-22, at 6 (1995), 1995 WL 56411 (describing the "need for the legislation" for a companion bill that would eventually be incorporated into AEDPA as addressing the issue of noncitizens with criminal histories who were "released into American society after they were released from incarceration"); *see generally* 137 Cong. Rec. 17,550 (1991) (statement of Sen. Seymour) ("[O]ur first priority must be to deport alien felons the very minute they're released from prison.").

4. With the enactment of IIRIRA in the fall of 1996, Congress once again expanded the group of individuals subject to mandatory detention. As before, for these and the other individuals covered by mandatory detention, the amendments focused on ensuring that the agency maintain a continuous chain of custody from criminal custody to immigration detention. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-546, 3009-585. Much like the predecessor statutes, IIRIRA's detention mandate—embodied in Section 1226(c)—directs the Attorney General to take into custody certain noncitizens "when [they are] released" from criminal custody. 8 U.S.C. § 1226(c)(1).

Legislative history demonstrates that, in revising the text of Section 1226(c) from "upon release" to "when . . . released," Congress did not intend to make a substantive change to the statute; the mandate continued to be triggered by the timing of release from criminal custody. *Compare* 8 U.S.C. § 1252(a)(1) (1996), *with* 8 U.S.C. § 1226(c)(1). As Senator Simpson, a leading sponsor of IIRIRA, explained just prior to conference, the bill "will ensure that aliens who

commit serious crimes are detained *upon their release from prison* until they can be deported." 142 Cong. Rec. S10572–01 (daily ed. Sept. 16, 1996), 1996 WL 522794 (statement of Sen. Simpson) (emphasis added). A House Report on the bill explained that the new measure was intended to "restate[]" AEDPA's mandatory detention provision, which required noncitizens to be taken into custody "upon release . . . from incarceration." *See* H.R. Rep. 104–469(I) (1996), 1996 WL 168955, at *230; 8 U.S.C. § 1252(a)(1) (1996); *see also* 142 Cong. Rec. 27216 (1996) (colloquy between Sens. Abraham and Hatch) (explaining that IIRIRA "would add to the Immigration and Nationality Act a new section providing for mandatory detention of criminal aliens . . . which was already required under the Anti-terrorism and Effective Death Penalty Act signed into law earlier this year").[6]

Over four iterations of the mandatory detention provisions, Congress's focus was on ensuring that certain noncitizens be transferred to immigration custody when they were released from criminal custody. The provisions do not address individuals like Respondent class members, many of whom have lived peacefully in their communities for years after serving their time for a criminal conviction.

---

[6] Nothing in the legislative history suggests that Congress intended the "when . . . released" clause in Section 1226(c) to mean "while" or "during the time that" a noncitizen was released from criminal custody, as the government contends. *See* Pet. Br. at 35. Had Congress intended such a sea change in the agency's obligations, Congress would have used much clearer language to signal the change, as it did with other provisions in IIRIRA. *See, e.g.*, 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order at *any time after* the reentry.") (emphasis added).

B. Congress's Prospective Application of Section 1226(c) and Modest Appropriations for Detention Bed Space Are Consistent with its Narrow Goal of Ensuring Continuous Custody of Certain Noncitizens

Congress's intent to limit the application of 1226(c) to a narrow group of noncitizens when they are released from criminal custody is further supported by the context of IIRIRA's enactment.

1. Congress declined to make the detention mandate retroactive: Section 1226(c) did not apply to those who were living peacefully in the community after having been released from criminal custody. *See* Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. at 3009-586 ("The amendment . . . [to Section 1226] shall become effective on the Title III-A effective date); *see generally INS v. St. Cyr*, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result.").

If Congress had made Section 1226(c) retroactive, mandatory detention would have applied to individuals who had previously been released from criminal custody, but who were newly subject to removal under IIRIRA's expanded grounds of removability. This is because in AEDPA and IIRIRA, Congress dramatically expanded the list of convictions that subjected noncitizens to mandatory detention. For instance, Congress substantially widened the definition of "aggravated felony" to include simple battery, theft, filing a false tax return, and failing to appear in court. *See* AEDPA, Pub. L. No. 104-132, § 440(e), 110 Stat.

at 1277-78; IIRIRA, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. at 3009-628, codified at 8 U.S.C. § 1101(a)(43); *see* 8 U.S.C. § 1101(a)(43)(F), (G), (M), (Q), & (T). Then, in IIRIRA, Congress made the aggravated felony definition expressly retroactive. *See* IIRIRA, Pub. L. No. 104-208, Div. C, § 321(b), 110 Stat. at 3009-628 (making IIRIRA's amended aggravated felony definition apply "regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph."). But by making the mandatory detention provision only prospective, Congress ensured that individuals long ago released from custody for convictions now deemed aggravated felonies would not be subject to that provision.

2. Congress's implementation of the Transition Period Custody Rules (TPCR) further demonstrates that Congress intended for mandatory detention to apply to only those individuals with certain convictions who were taken into immigration custody when released from criminal custody. Under the TPCR, Congress permitted the Attorney General to delay implementation of IIRIRA's mandatory detention provision for up to two years. IIRIRA, Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. at 3009-586. The TPCR provided that "the provisions of [] section 236(c) shall apply to individuals released after such periods." *Id.* This meant that the detention mandate would apply only to individuals released from criminal custody *after* the expiration of the TPCR period. The INS adopted this reading of the statute in its own bond adjudications. *In re Adeniji*, 22 I. & N. Dec. 1102, 1111 (BIA 1999). Because the agency availed itself of the full two-year delay, noncitizens released from criminal custody after October 8, 1998, were subject to

mandatory detention, whereas those released on or before October 7, 1998, were not.

This history reveals a fundamental flaw in the government's interpretation of the statute. If mandatory detention applied to all noncitizens with predicate offense convictions, as the government contends, then the agency could have subjected noncitizens with predicate offense convictions to mandatory detention at any point in time, regardless of when they were released from criminal custody. In that case, there would have been no need for the October 8, 1998 enforcement date, and there would have been no need to tether the imposition of mandatory detention to the timing of a noncitizen's release from criminal custody.

3. The appropriations to implement IIRIRA's mandatory detention provision fell far short of what was needed to keep pace with IIRIRA's expanded list of triggering convictions, let alone the levels needed to locate and detain noncitizens who had previously been released from criminal custody.

The INS General Counsel testified that, as of 1996, INS had fewer than 10,000 beds and did not have the resources to implement AEDPA's mandatory detention provision. *See Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 15-16, 34-35, 50, Serial No. 103 (1996) (prepared statement and testimony of David A. Martin, General Counsel, INS). Given funding and bed space limitations, INS stated that it was focusing its limited resources on the problem Congress sought to solve: ensuring that noncitizens with convictions for predicate offenses be taken into immigration custody when

released from criminal custody, not finding and detaining without bond those who had served their sentences and were living in the community. In March 1995, the General Counsel of INS testified that, "[b]ecause of [INS's] scarce resources," INS "targeted [its] resources in the State prisons and the Federal prisons . . . to make sure that we remove those people[.]" *Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 29, Serial No. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS). The INS General Counsel testified in 1996 that apprehending individuals with criminal convictions in the community required far greater investigative resources, reliable availability of detention space, and additional attorneys than the agency had at its disposal. *Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 50, Serial No. 103 (1996) (testimony of David A. Martin, General Counsel, INS).

Congressional appropriations and bed space allocations around IIRIRA's enactment did not allow the agency to keep pace with the statute's expanded list of predicate offenses. IIRIRA itself only required "the Attorney General . . . [to] provide for an increase in the detention facilities of the Immigration and Naturalization Service to at least 9,000 beds before the end of fiscal year 1997," "*subject to the availability of appropriations*." IIRIRA, Pub. L. No. 104-208, Div. C, § 386, 110 Stat. at 3009-653 (codified at 8 U.S.C. § 1368) (emphasis added). The INS increased its bed space to 12,050 beds in 1997 and 13,491 beds in 1998. *Dep'ts of Commerce, Justice, and State, the Judiciary,*

and Related Agencies Appropriations for Fiscal Year 1999, Hearings Before a Subcomm. of the S. Comm. on Appropriations, 105th Cong. 172 (1998) (statement of Doris Meissner, INS Commissioner).

* * *

If Congress had intended to mandatorily detain *all* noncitizens with predicate offense convictions, it would have made the detention mandate retroactive and then dramatically expanded appropriations to address agency resource and bed space shortfalls. Instead, it applied the mandate only prospectively and allocated funds and bed space in a manner consistent with the agency's stated focus on noncitizens apprehended by the agency when released from criminal custody.

C. After IIRIRA, Congress Considered and Rejected Numerous Proposed Amendments That Would Have Dramatically Expanded the Scope of Section 1226(c) to Apply to All Noncitizens Convicted of a Predicate Offense

Since Congress enacted IIRIRA in 1996, it has rejected numerous proposed amendments that would have dramatically expanded the scope of Section 1226(c) to apply to all noncitizens convicted of an enumerated offense, any time after they are released from criminal custody. Congress's repeated refusal to enact this broader version of mandatory detention further supports Respondents' and the lower court's interpretation of Section 1226(c) as applying to only noncitizens when released directly from criminal custody to immigration custody.

Congress has considered and rejected the language that the government now seeks to read into Section 1226(c) at least five times. *See* H.R. 1901, 113th Cong. (2013); H.R. 2278, 113th Cong. (2013); S. 2463, 113th Cong. (2014); S. 291, 114th Cong. (2015); S. 1640, 114th Cong. (2015). For example, the Keep Our Communities Safe Act of 2011 (which Congress did not pass) sought to amend Section 1226(c)(1)(D) to allow for mandatory detention:

> *any time after the alien is released*, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense.

H.R. Rep. 112–255, at 5 (2011) (emphasis added). In considering the Keep Our Communities Safe Act, Congress underscored that the proposed amendment would "greatly expand[] the number of people subject to mandatory detention by eliminating the requirement that the release from criminal custody be tied to the offense triggering mandatory detention." *Id.* at 52 (Dissenting Views). This major shift in policy would mean that "mandatory detention would apply to individuals who have long since been released from criminal custody for any offense listed in the statute and who are now leading productive lives in the community." *Id.*; *see also Keep Our Communities Safe Act, Hearing on H.R. 1932 Before the Subcomm. on Immi-*

gration Policy and Enf't of the Comm. on the Judiciary, 112th Cong. 24 (2011) (statement of Congressman Conyers) ("Under the bill, thousands of immigration detainees *would become* subject to mandatory detention....") (emphasis added).

Indeed, members of Congress who opposed the bill objected that it would "expand[] the scope of mandatory detention to include persons who have been at liberty for years and leading productive lives on the basis of old criminal offenses, rather than applying mandatory detention to non-citizens at the time of their release from sentences for designated crimes." H.R. Rep. 112–255, at 47 (2011) (Dissenting Views).

In rejecting the Keep Our Communities Safe Act and the other proposed amendments that would have dramatically expanded the scope of mandatory detention under IIRIRA, Congress repudiated the very interpretation of the statute that the government proffers in this case.[7]

II. THE STRUCTURE OF SECTION 1226(c) AND ITS PREDECESSOR STATUTES CONFIRMS CONGRESS'S NARROW GOAL FOR MANDATORY DETENTION

The structure of Section 1226(c) also contradicts the government's theory that mandatory detention applies broadly to all noncitizens convicted of a predicate offense, regardless of whether they were taken

---

[7] Congress considered other post-IIRIRA amendments that would have refocused mandatory detention on a narrower category of predicate offenses; these are irrelevant to the precise issue before the Court.

into immigration custody when released from criminal custody. *See* Pet. Br. at 13-17. Each mandatory detention provision—through four iterations of the statute—followed the same pattern of requiring that the agency (1) *take custody* of certain noncitizens at the point of their release from criminal custody, and then (2) *retain custody* of those same noncitizens thereafter. This structure confirms Congress's narrow purpose for mandatory detention: to maintain continuous custody over noncitizens with certain specified convictions—from criminal custody to immigration detention to potential removal.

In each version of the INA's detention mandate that predated IIRIRA, Congress required first that the Attorney General "shall take into [immigration] custody any alien convicted" of an enumerated felony offense "upon completion" of the criminal sentence (1988 mandate) or "upon release" from criminal custody (later mandates). *See* 8 U.S.C. § 1252(a)(2) (1989); 8 U.S.C. § 12[illegible])(2) (1991); 8 U.S.C. § 1252(a)(2) (1996). And, in each prior version, Congress then required that the Attorney General "shall not release *such felon* from [immigration] custody." *Id.* (emphasis added). The text expressly limited the detention mandate, in each iteration, to the same "such felon" whom the Attorney General took into custody "upon completion" of a criminal sentence or "upon release" from criminal custody.

The BIA and district courts interpreted IIRIRA's predecessor statutes in just this way—reading the detention mandate to be limited to those noncitizens who were first taken into immigration custody at the moment when they were released from criminal custody. *See, e.g.*, *Matter of Eden*, 20 I. & N. Dec. at 211

(interpreting the 1988 Act); *DeMelo v. Cobb*, 936 F. Supp. 30, 36 (D. Mass. 1996) (interpreting AEDPA), *vacated as moot after IIRIRA's passage*, 108 F.3d 328 (1st Cir. 1997) (per curiam) (unpublished); *Villagomez v. Smith*, No. 96-1141, 1996 WL 622451, at *2 (W.D. Wash. July 31, 1996) (unpublished) (interpreting AEDPA).

Against the backdrop of this prevailing interpretation of the statute, Congress drafted IIRIRA's detention mandate to follow the same structure as all of its precursors. *First*, in paragraph (1) of Section 1226(c), Congress required that, "when the alien is released" from criminal custody, the Attorney General "shall take [the noncitizen] into custody[.]" 8 U.S.C. § 1226(c)(1). *Second*, in the subsequent paragraph, it provided that the "Attorney General may release an alien described in paragraph (1)" only under extremely limited circumstances that are not applicable here. *Id.* § 1226(c)(2).[8]

IIRIRA's specific instructions to the agency regarding custody and release operate in tandem, just as they did in all prior versions of mandatory detention. The mandate under Section 1226(c) applies explicitly to the noncitizens described in Section 1226(c)(1) *as a whole—i.e.*, noncitizens who were both convicted of a predicate offense and taken into immigration custody when they were released from criminal custody.

---

[8] Congress broadened the cross-reference from AEDPA to read "described in paragraph (1)," instead of "such felon," to account for the fact that not all noncitizens subject to IIRIRA's expanded list of predicate offenses qualify as "felons."

Had Congress intended Section 1226(c) to conform to the government's interpretation, it would have expressly decoupled the detention mandate from the timing of a noncitizen's release by either providing that the agency could take custody of these noncitizens *at any time* after their release from criminal custody, or specifying that the detention mandate applies to the "alien described *in subparagraphs (A)-(D)* in paragraph (1)," or both. But Congress did neither of these things. Instead, it chose to retain the clear structure and meaning of IIRIRA's precursors. H.R. Rep. 104–469(I) (1996), 1996 WL 168955, at *230 (stating that Section 1226(c) was intended to "restate[]" the provisions of the detention mandate under AEDPA).

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

GEOFFREY H. YOST
WARD A. PENFOLD
DIANA ROGOSA
ALEXA GRAUMLICH
ERIC ORMSBY
MARISSA RHOADES
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

JAYASHRI SRIKANTIAH
(*Counsel of Record*)
jsrikantiah@law.stanford.edu
JENNIFER L. STARK
IMMIGRANTS' RIGHTS CLINIC
MILLS LEGAL CLINIC
STANFORD LAW SCHOOL
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

Counsel for Amici Curiae

August 13, 2018

No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN,
SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

MONY PREAP, ET AL.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief for *Amicus Curiae* National Immigrant Justice Center in Support of Respondents

CHARLES G. ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle Street
Suite 1300
Chicago, IL 60601
(312) 660-1613
croth@heartlandalliance.org

ELAINE J. GOLDENBERG
COUNSEL OF RECORD
CELIA R. CHOY
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W.
Seventh Floor
Washington, DC 20004-1357
(202) 220-1100
Elaine.Goldenberg@mto.com
Celia.Choy@mto.com

Counsel for Amicus Curiae National Immigrant Justice Center

TABLE OF CONTENTS

PAGE

Interest Of *Amicus Curiae* 1

Introduction And Summary Of Argument 1

Argument 5

I. Mandatory Detention Applies To Individuals Who Have Committed Low-Level Offenses That Pose No Danger To The Public And For Whom Removal is Not Preordained. 5

II. The Timing Of A Noncitizen's Detention On Immigration Charges Is Highly Relevant Under Section 1226(c) Precisely Because Mandatory Detention Applies To Low-Level Offenders. 15

III. The Government's Reading Would Raise Significant Doubts About The Constitutionality Of The Statute 17

IV. The Government Understates Its Ability To Take Noncitizens Into Immigration Custody Promptly After Their Release From Criminal Custody 19

Conclusion 28

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Carty v. *Ashcroft*,
395 F.3d 1081 (9th Cir. 2005).....8

Castillo-Torres v. *Holder*,
394 F. App'x 517 (10th Cir. 2010) 8

De Leon v. *Lynch*,
808 F.3d 1224 (10th Cir. 2015).....8

Demore v. *Kim*,
538 U.S. 510 (2003).....*passim*

Hashish v. *Gonzales*,
442 F.3d 572 (7th Cir. 2006).....8

Ijoma v. *INS*,
875 F. Supp. 625 (D. Neb. 1995),
aff'd, 76 F.3d 382 (8th Cir. 1996) 8

Lopez-Aguilar v. *Marion Cty. Sheriff's Dep't*,
296 F. Supp. 3d 959 (S.D. Ind. 2017) 27

Marin-Rodriguez v. *Holder*,
710 F.3d 734 (7th Cir. 2013).....8

Miranda-Olivares v. *Clackamas Cty.*,
No. 3:12-CV-02317-ST, 2014 WL
1414305 (D. Or. Apr. 11, 2014).....25, 26

Morales v. *Chadbourne*,
996 F. Supp. 2d 19 (D.R.I. 2014),
aff'd, 793 F.3d 208 (1st Cir. 2015) 25

Moreno v. *Napolitano*,
213 F. Supp. 3d 999 (N.D. Ill. 2016) 25

Pulido-Alatorre v. *Holder*,
381 F. App'x 355 (5th Cir. 2010) 8

Rohit v. *Holder*,
670 F.3d 1085 (9th Cir. 2012) 9

Roy v. *County of Los Angeles*,
No. CV 12-09012, 2018 WL 914773
(C.D. Cal. Feb. 7, 2018),
reconsideration denied, No. CV-12-
09012, 2018 WL 3439168 (C.D. Cal.
July 11, 2018) 26

Sylvain v. *Attorney Gen. of U.S.*,
714 F.3d 150 (3d Cir. 2013) 2, 3

Tall v. *Mukasey*,
517 F.3d 1115 (9th Cir. 2008) 8

Torres v. *Lynch*,
136 S. Ct. 1619 (2016) 7

United States v. *Esparza-Ponce*,
193 F.3d 1133 (9th Cir. 1999) 8

Wong Wing v. *United States*,
163 U.S. 228 (1896) 17

Zadvydas v. *Davis*,
533 U.S. 678 (2001).....17, 18

Zaitona v. *INS*,
9 F.3d 432 (6th Cir. 1993).....8

REGULATORY CASES

Matter of Andrade,
19 I. & N. Dec. 488 (BIA 1987).....13, 14

Matter of C-V-T-,
22 I. & N. Dec. 7 (BIA 1998).....16

Matter of Edwards,
20 I. & N. Dec. 191 (BIA 1990).....16

Matter of Guerra,
24 I. & N. Dec. 37 (BIA 2006).....13

Matter of Marin,
16 I. & N. Dec. 581 (BIA 1978).....16

Matter of Padilla-Vargas,
No. A43 281 648 - BOST, 2004 WL
2943509 (DCBABR Nov. 15, 2004).....14

Matter of Rainford,
20 I. & N. Dec. 598 (BIA 1992).....11, 12

In re Rojas,
23 I. & N. Dec. 117 (BIA 2001) (en
banc).....2, 4, 15

Matter of Urena,
25 I. & N. Dec. 140 (BIA 2009).....14

FEDERAL STATUTES

8 U.S.C. 1158(b)(2)(B)(i) 11

8 U.S.C. 1182 ..... 7, 8, 10, 12

8 U.S.C. 1226 ..... *passim*

8 U.S.C. 1227 ..... 7, 8, 9, 10

8 U.S.C. 1229b(a) 11

8 U.S.C. 1255(a) 11

STATE STATUTES

Cal. Gov't Code § 7284.4 24

Cal. Gov't Code § 7285.5 24

FEDERAL REGULATIONS

8 C.F.R. 1003.6 ..... 14, 15

8 C.F.R. 1236.1(c)(8) 13

OTHER AUTHORITIES

Congressional Research Serv., *Interior Immigration Enforcement: Criminal Alien Programs* (Sept. 8, 2016) 19, 20, 21

DHS Form I-247D (Rev. 5/15), https://www.ice.gov/sites/default/files/ documents/Document/2016/I-247D.PDF 26

Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), https://www.whitehouse.gov/presidential-actions/ 20

Immigrant Legal Resource Center, *Practice Advisory: SB 54 and the California Values Act* (Feb. 2018), https://www.ilrc.org/sites/default/files/resources/ sb54_advisory-gr-20180208.pdf 24

Inspector General, *Audit Report: Immigration and Naturalization Service Institutional Removal Program* (Sept. 2002), https://oig.justice.gov/reports/INS/a0241/final.pdf 22

National Lawyers Guild, *Understanding Immigration Detainers: An Overview for State Defense Counsel* (Mar. 2011), https://nationalimmigrationproject.org/pdfs/practitioners/practice_advisories/crim/2011_may_understand-detainers.pdf 25

Transactional Record Access Clearinghouse, *Charges Asserted in Deportation Proceedings in the Immigration Courts*, http://trac.syr.edu/immigration/reports/260/include/detailchg.html 9, 10

Transactional Record Access Clearinghouse, *Has Cooperation by State and Local Law Enforcement Agencies Improved ICE's Apprehension Numbers?*, http://trac.syr.edu/immigration/reports/433/ 23

Transactional Record Access Clearinghouse, *Latest Data: Immigration and Customs Enforcement Detainers*, http://trac.syr.edu/phptools/immigra 21, 23

Transactional Record Access Clearinghouse, *New Deportation Proceedings Filed in Immigration Court*, http://trac.syr.edu/phptools/immigration/ 10

Transactional Record Access Clearinghouse, *Use of ICE Detainers: Obama v. Trump*, http://trac.syr.edu/immigration/reports/479/ 22

U.S. Immigration and Customs Enforcement, *Immigration Detainer—Notice of Action* (Rev. 12/12), https://www.ice.gov/doclib/secure-communities/pdf/immigra tion-detainer-form.pdf.....25

U.S. Immigration and Customs Enforcement, *Institutional Removal Program National Workload Study*, (Sept. 2004), https://cis.org/sites/cis.org/files/articl es/2009/fent ress-report.pdf.....22

U.S. Immigration and Customs Enforcement, *Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers* § 2.4 (Mar. 24, 2017), https://www.ice.gov/sites/default/file s/ 26

U.S. Immigration and Customs Enforcement, *Detainer Policy*, https://www.ice.gov/detainer-policy 21

U.S. Immigration and Customs Enforcement, *Priority Enforcement Program*, https://www.ice.gov/pep.....20

U.S. Immigration and Customs Enforcement, *Secure Communities*, https://www.ice.gov/secure-communities.....20, 21

INTEREST OF *AMICUS CURIAE*

Amicus National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization that provides legal representation and consultation to low-income immigrants, refugees, and asylum seekers across the country. Together with over 1500 pro bono attorneys, NIJC represents thousands of individuals annually, including noncitizens who will be directly affected by the Court's resolution of the question presented in this case. NIJC's extensive experience representing noncitizens in immigration detention and removal proceedings makes it well positioned to assist the Court in understanding how the statutory provision at issue in this case operates in practice and why the Ninth Circuit's interpretation of that provision is consistent with those practical realities.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the proper construction of 8 U.S.C. 1226(c), which provides that the Attorney General must detain certain noncitizens, without opportunity for release on bond, pending resolution of their removal proceedings. See 8 U.S.C. 1226(a), (c). The court of appeals correctly held that Section 1226(c) applies to noncitizens only if the government

---

[1] Counsel for the petitioners and counsel for the respondents have consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

detains them promptly upon their release from criminal custody. See Pet. App. 1a-59a; 8 U.S.C. 1226(c)(1) (stating that the Attorney General "shall take into custody" a noncitizen who has committed any of certain offenses "when the alien is released"). Under that ruling, noncitizens who are not promptly detained are subject to Section 1226(a), pursuant to which the government may detain them unless they demonstrate eligibility for release on a bond. 8 U.S.C. 1226(a) (stating that "[e]xcept as provided in subsection (c)" the government "may release the alien on * * * bond").

In challenging the decision of the court of appeals, the government makes certain assumptions and generalizations that are unjustified. The government asserts that the Ninth Circuit's interpretation of the statute would "bestow[] a windfall upon dangerous criminals," Pet. Br. 11-12 (quoting *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013)), and would "re-enabl[e] the very problems of flight and recidivism * * * that Congress enacted Section 1226(c) to prevent," Pet. Br. 24. The government also asserts that if the Ninth Circuit's judgment is affirmed then "criminal aliens would become exempt from mandatory detention based on a factor" that "is irrelevant for all other immigration purposes": a "gap in custody." Pet. Br. 24 (quoting *In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc)); see *ibid.* (stating that such a gap "has nothing to do with the alien's criminal history, dangerousness, or flight risk"). Those assertions significantly underpin the government's statutory argument, which relies on the notion that Congress would not have had any

justification for distinguishing in Section 1226(c) between individuals who are taken into immigration custody promptly upon their release from imprisonment for a crime and individuals who are not taken into immigration custody until some later point.

But the government's portrayal of the context in which Section 1226(c) is applied is significantly oversimplified. Understood in proper context, the distinction drawn by Congress in Section 1226(c) between noncitizens who are detained promptly upon release from custody ("when the alien is released," 8 U.S.C. 1226(c)(1)) and those who instead resettle into the community has an obvious rationale and reflects sensible policy judgments.

First, as a practical matter, it is not the case that the construction adopted by the court of appeals would result in the release of large numbers of "dangerous criminals." Pet. Br. 11-12 (quoting *Sylvain*, 714 F.3d at 160-161). Many noncitizens who have convictions described in subsections (A) through (D) of Section 1226(c)(1) are low-level offenders, and many are eligible for various forms of relief from removal that would enable them to remain lawfully and permanently in the United States. In addition, many of those low-level offenders, if given the opportunity for a bond hearing, could demonstrate that they pose neither a flight risk nor a danger to the community. Those who resettle in the community after serving a term of imprisonment and live peacefully for months or years are particularly unlikely to pose a danger. By contrast, aggravated felons and terrorists would be unlikely to be released on bond even if Section

1226(c) did not apply. Section 1226(c) must be interpreted in light of the fact that the opportunity to post bond primarily benefits low-level offenders, not aggravated felons or others who have committed serious criminal offenses.

Second, because the mandatory detention statute includes so many low-level offenses, the distinction between noncitizens who are detained immediately upon release from criminal custody and those who resettle in the community is far from "irrelevant." Pet. Br. 24 (quoting *Rojas*, 23 I. & N. Dec. at 122). To the contrary, living in the community for months or years after being released from criminal custody gives a noncitizen an opportunity to demonstrate *rehabilitation*, which longstanding agency case law treats as a near-requirement for relief from removal after a criminal conviction. Noncitizens who have resettled into the community therefore have a stronger incentive to litigate their removal proceedings than their counterparts who have not had a comparable opportunity, and need not necessarily be detained to ensure that they appear.

Third, the distinction drawn by Congress avoids serious constitutional concerns. This Court has held that mandatory, preventative detention can be justified based on dangerousness and risk of flight, insofar as necessary to effectuate removal. See *Demore* v. *Kim*, 538 U.S. 510, 518-520 (2003). Those justifications do not hold when applied to noncitizens who have lived freely for substantial periods of time after release from criminal custody and may be fully rehabilitated. Congress crafted the mandatory detention provision in a manner that avoids the constitutional concerns that might arise from

detaining such noncitizens without any possibility of bond.

Finally, the government understates its ability to take noncitizens into immigration custody immediately after their release from criminal custody. Immigration and Customs Enforcement (ICE) has extensive programs for identifying and detaining potentially removable noncitizens in federal, state, and local custody. To the extent it fails to do so, that failure is largely the result of ICE's own policy choices and resource allocation decisions. Localities comply with the vast majority of ICE's requests to notify it in advance of a noncitizen's release or to detain the noncitizen beyond his or her scheduled release date to facilitate ICE taking the noncitizen into custody. Where localities have declined to comply, it is often as a result of legal impediments, some of which are caused by ICE's own policies.

ARGUMENT

I. Mandatory Detention Applies To Individuals Who Have Committed Low-Level Offenses That Pose No Danger To The Public And For Whom Removal Is Not Preordained.

As an initial matter, it is important to interpret Section 1226(c) in light of the fact that the opportunity for a bond hearing most benefits those who have committed relatively low-level offenses, not those who have committed the "dangerous" crimes that the government posits. Many of the offenses described in subsections (A) through (D) of Section 1226(c)(1) are not serious and do not bar

noncitizens convicted of them from obtaining relief from removal. It is noncitizens who have low-level convictions, who have completed their sentences and lived law-abiding lives in the community for months or years, and who may earn the right to remain permanently in the United States who are likely to obtain release on bond, not dangerous criminals or terrorists.

The application of mandatory detention to those classes of noncitizens also provides an essential clue to how to read the statute. If Congress had mandated detention only for noncitizen classes it made generally ineligible for relief from removal, it might make sense to presume that Congress intended to require detention of people it considered generally undesirable, as a prelude to removal. But the fact that Congress adopted the same mandatory detention regime for classes of noncitizens generally eligible for relief from removal suggests that Congress was focused on something else: recency of release.

A. Many Noncitizens With Convictions Covered By Subsections (A) Through (D) Of Section 1226(c)(1) Are Low-Level Offenders.

The offenses that may trigger detention under Section 1226(c)(1) are referenced in subsections (A) through (D) of that provision. Some of those triggering offenses are serious, such as commission of certain aggravated felonies. See, *e.g.*, 8 U.S.C. 1226(c)(1)(B) (incorporating 8 U.S.C. 1227(a)(2)(A)(iii)); *Torres* v. *Lynch*, 136 S. Ct. 1619, 1623 (2016) (explaining that the "21 subparagraphs" of the

aggravated felony definition "enumerate some 80 different crimes").

But many—indeed, most—offenses covered by subsections (A) through (D) of Section 1226(c)(1) do not present the same type of public safety concerns. For instance, those subsections reach any noncitizen who has committed virtually any controlled substance offense, see 8 U.S.C. 1226(c)(1)(A)-(B) (incorporating 8 U.S.C. 1182(a)(2)(A)(i)(II) and 8 U.S.C. 1227(a)(2)(B)),[2] or undertaken certain conduct related to commercialized vice, including having engaged in prostitution in the previous ten years, see 8 U.S.C. 1226(c)(1)(A) (incorporating 8 U.S.C. 1182(a)(2)(D)).

The triggering offenses also include convictions for crimes involving moral turpitude, a term that is not defined in the statute and that the courts have

---

[2] Specifically, Section 1226(c)(1)(A) refers to any inadmissibility by reason of having committed any offense covered in Section 1182(a)(2), which in turn makes inadmissible any noncitizen who has been "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of * * * a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. 1182(a)(2), 1226(c)(1)(A); see 8 U.S.C. 1182(a) (discussing grounds of inadmissibility). Section 1226(c)(1)(B) refers to "deportab[ility]" by reason of having committed any offense covered in Section 1227(a)(2)(B), which in turn makes "deportable" any noncitizen who, at any time after admission, has been convicted of any controlled substance violation "other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B); see 8 U.S.C. 1226(c)(1)(B); see also 8 U.S.C. 1227(a) (discussing "classes of deportable aliens").

interpreted broadly. See 8 U.S.C. 1226(c)(1)(A), (C) (incorporating 8 U.S.C. 1182(a)(2)(A)(i)(I) and 8 U.S.C. 1227(a)(2)(A)(i)). Under that broad interpretation, the category includes many low-level offenses.

For example, the Seventh Circuit found that "theft of a recordable sound"—*i.e.*, illegally downloading music—constituted a crime involving moral turpitude. *Hashish* v. *Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006). Other low-level offenses that have been held to involve moral turpitude include petty theft, see *United States* v. *Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999), writing bad checks, see *Ijoma* v. *INS*, 875 F. Supp. 625, 630 (D. Neb. 1995), *aff'd*, 76 F.3d 382 (8th Cir. 1996), misdemeanor burglary of a motor vehicle, see *Pulido-Alatorre* v. *Holder*, 381 F. App'x 355, 358 (5th Cir. 2010), making false statements on a driver's license application, see *Zaitona* v. *INS*, 9 F.3d 432, 438 (6th Cir. 1993), giving false identification information to a police officer, see *Castillo-Torres* v. *Holder*, 394 F. App'x 517, 521 (10th Cir. 2010), manufacturing or selling counterfeit goods, see *Tall* v. *Mukasey*, 517 F.3d 1115, 1119 (9th Cir. 2008), willful failure to file a tax return, see *Carty* v. *Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005), using a false Social Security card to obtain employment, see *Marin-Rodriguez* v. *Holder*, 710 F.3d 734, 739 (7th Cir. 2013), possession of a stolen vehicle, see *De Leon* v. *Lynch*, 808 F.3d 1224, 1232 (10th Cir. 2015), and soliciting prostitution, see *Rohit* v. *Holder*, 670 F.3d 1085, 1091 (9th Cir. 2012).

Thus, it is simply not the case that all offenses listed in subsections (A) through (D) of Section

1226(c) are serious or violent in nature. Indeed, the available data suggest that the majority of immigration charges that could trigger mandatory detention under Section 1226(c) actually involve relatively less serious offenses. From October 1, 2001 to July 26, 2011, the government asserted 430,081 new immigration charges based on statutory provisions covered by subsections (A) through (D) of Section 1226(c)(1).[3] Of those new immigration charges, only 24% were based on aggravated felony convictions. A full 32.5% were based on controlled substance violations, not including controlled substance trafficking.[4] After fiscal year 2011, publicly available data do not reflect the specific statutory provisions on which immigration charges are based, but do classify charges as based on

---

[3] Note that the figure set forth above represents the number of charges asserted, not the number of individuals charged. The government may assert multiple charges against a single individual. In addition, the data include 15,578 new immigration charges based on Section 1227(a)(2)(A)(i), which applies to crimes of moral turpitude. A charge based on that provision is covered by subsections (A) to (D) only if the noncitizen was sentenced to a term of imprisonment of at least one year, but the data do not reflect the length of the sentence imposed. Thus, while we include those charges in our analysis, we note that the figure may include some charges that would not come within the scope of subsections (A) through (D) of Section 1226(c)(1).

[4] See Transactional Record Access Clearinghouse (TRAC), *Charges Asserted in Deportation Proceedings in the Immigration Courts*, http://trac.syr.edu/immigration/reports/260/include/detailchg.html (accessed Aug. 1, 2018).

aggravated felonies versus "other criminal."[5] From October 1, 2011 to June 30, 2018, the government asserted more than twice as many immigration charges in the "other criminal" category as it did in the aggravated felony category.[6]

---

[5] Because the data do not include the statutory provisions charged, it is impossible to determine how many of the charges come within the scope of subsections (A) through (D) of Section 1226(c)(1). Therefore, these calculation set forth in the text may include some "other criminal" charges that do not trigger detention under Section 1226(c)(1).

[6] See TRAC, *New Deportation Proceedings Filed in Immigration Court*, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (accessed Aug. 1, 2018). The offenses described in subsections (A) through (D) of Section 1226(c)(1) also include commission of certain offenses involving terrorist acts or association with a terrorist organization, see 8 U.S.C. 1226(c)(1)(D) (incorporating 8 U.S.C. 1182(a)(3)(B) and 8 U.S.C. 1227(a)(4)(B)), and commission of certain offenses related to national security, such as espionage, sabotage, treason, or sedition, see 8 U.S.C. 1226(c)(1)(B) (incorporating 8 U.S.C. 1227(a)(2)(D)). But the number of noncitizens charged under those provisions is vanishingly small. From October 1, 2001 to July 26, 2011, the government asserted only 44 immigration charges based on terrorism-related grounds covered by subsections (A) through (D) of Section 1226(c)(1) and only 55 immigration charges based on grounds related to national security covered by those subsections. Transactional Record Access Clearinghouse (TRAC), *Charges Asserted in Deportation Proceedings in the Immigration Courts*, http://trac.syr.edu/immigration/reports/260/include/detailchg.html (accessed Aug. 1, 2018). Similarly, from October 1, 2011 to June 30, 2018, only 0.02% of new immigration charges were terrorism-related and only 0.17% were related to national security. See TRAC, *New Deportation Proceedings Filed in Immigration Court*, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (accessed Aug. 1, 2018).

B. Congress Made Many Noncitizens Covered By Section 1226(c)(1) Eligible For Relief From Removal.

Congress made many noncitizens covered under subsections (A) through (D) of Section 1226(c)(1) statutorily eligible for relief from removal—that is, for the right to remain permanently in the United States.

Relief from removal for individuals who fall within the scope of subsections (A) through (D) of Section 1226(c)(1) can take various forms. Lawful permanent residents, for example, are eligible for cancellation of removal unless they have been convicted of an aggravated felony. See 8 U.S.C. 1229b(a). Asylum is available to noncitizens, whether lawful permanent residents or otherwise, who meet the relevant statutory requirements and have not been convicted of a "particularly serious crime," which includes aggravated felonies and other offenses designated by the Attorney General. See 8 U.S.C. 1158(b)(2)(B)(i). Noncitizens who are admissible to the United States and eligible to receive an immigrant visa—for example, because they have a spouse, child over age 21, or parent who is a U.S. citizen—may apply for adjustment of status to lawful permanent resident, even if they have a conviction that would otherwise render them removable. See 8 U.S.C. 1255(a); *Matter of Rainford*, 20 I. & N. Dec. 598 (BIA 1992). Finally, the Attorney General may, under certain circumstances, waive specified criminal grounds of inadmissibility: crimes of moral turpitude, a single offense of simple possession of 30 grams or less of marijuana, multiple

criminal convictions for which at least five years' imprisonment was imposed, prostitution or other commercialized vice, and serious criminal activity for which the noncitizen has asserted immunity. See 8 U.S.C. 1182(h). Noncitizens who obtain those forms of relief are not removable on the basis of the charged convictions and may maintain or obtain the right to remain permanently and lawfully in the United States. See, *e.g.*, *Matter of Rainford*, 20 I. & N. Dec. at 602 (noting that a noncitizen who is granted adjustment of status "will no longer be deportable on the basis of this prior conviction").

The government's suggestion that mandatory detention should be regarded as simply a waystation along the road to ultimate removal, see, *e.g.*, Pet. Br. 24, is therefore a significant oversimplification. That cannot be how Congress saw it, given that Congress simultaneously made individuals covered by the majority of the offenses listed in subsections (A) through (D) of Section 1226(c)(1) eligible to obtain discretionary relief that allows them to remain freely in the United States. For that reason, it is more sensible to understand Section 1226(c) as the Ninth Circuit did: as a conclusive presumption that applies only in cases in which a noncitizen went directly from criminal to immigration custody, in which case the likelihood that the individual in question could establish rehabilitation and eligibility for relief from removal is at its nadir. See 8 U.S.C. 1226(a), (c)(1); *infra* Part II.

C. Dangerous Criminals and Terrorists Are Unlikely To Be Released On Bond Regardless Of Whether Section 1226(c) Applies.

Noncitizens who have been convicted of one of the triggering offenses and have served their criminal sentences, but were not taken into custody by the government "when * * * released," 8 U.S.C. 1226(c)(1), and therefore have resettled in the community, may be fully rehabilitated. Those are precisely the types of individuals who may be able to demonstrate the factors justifying release on bond. In a bond proceeding, the noncitizen must convince the adjudicator that she does not pose a danger to persons or property and is likely to appear at future immigration proceedings. See 8 C.F.R. 1236.1(c)(8). Relevant factors include length of residence in the community, strong family ties, stable employment history, passage of many years since any criminal activity, and lack of dangerousness—all factors that someone who has been out of custody for a period of time may be able to establish. See *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (BIA 1987) (describing factors relevant to bond determination); *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006) (same).

In contrast, aggravated felons and other serious offenders would be unlikely to be released on bond even if they are not subject to mandatory detention under Section 1226(c). A noncitizen with a history of violent criminal behavior is highly unlikely to be able to prove that she is not dangerous. See *Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009)

("Dangerous aliens are properly detained without bond."); *Matter of Padilla-Vargas*, No. A43 281 648 - BOST, 2004 WL 2943509, at *2 (DCBABR Nov. 15, 2004) (holding that "even if the respondent were not subject to mandatory detention" he would not merit bond "because he poses a danger to the community due to his recidivist misconduct").

In addition, a noncitizen's criminal record affects eligibility for relief from removal, which in turn provides an incentive or disincentive to appear for removal hearings. See *Matter of Andrade*, 19 I. & N. Dec. at 490; *infra* Part II. Aggravated felons are generally not eligible for relief from removal and therefore generally pose a greater risk of flight than their counterparts whose convictions are less serious.

Finally, administrative mechanisms ensure that noncitizens are not summarily released from custody. The rules err, if anything, in the opposite direction. If an immigration judge grants bond in a case in which the Department of Homeland Security (DHS) found bond inappropriate, DHS now has the power by regulation to impose a 90-day automatic stay of the bond decision while it appeals to the Board of Immigration Appeals. See 8 C.F.R. 1003.6(c)(5). In such cases, the Board must decide the appeal within that period or decide whether to issue a discretionary stay of release. See *ibid.* And even if the Board upholds the bond decision, release is delayed by another five business days to permit the Attorney General to review the decision. See 8 C.F.R. 1003.6(d).

The government's focus on aggravated felonies thus obscures the main effect of the statutory detention scheme. A host of rules and policies now in place tend to prevent release of noncitizens except those with the most minor of convictions.

II. The Timing Of A Noncitizen's Detention On Immigration Charges Is Highly Relevant Under Section 1226(C) Precisely Because Mandatory Detention Applies To Low-Level Offenders.

The government contends that the timing of the noncitizen's detention on immigration charges is "irrelevant for all other immigration purposes." Pet. Br. 24 (quoting *Rojas*, 23 I. & N. Dec. at 122). If mandatory detention were limited to individuals whom Congress made ineligible for immigration relief, that might have been true. But the statute does not operate as the government suggests. For individuals eligible for relief from removal, longstanding agency case law places great importance on the recency of release from criminal custody. Thus, noncitizens who have lived in the community post-release are not similarly situated to their counterparts who were detained promptly. The structure of the statute, and its breadth of application, therefore provides powerful evidence that applicability of mandatory detention turns on whether a noncitizen is taken into immigration custody "when * * * released." 8 U.S.C. 1226(c)(1).

A noncitizen with a criminal record "will ordinarily be required to present evidence of rehabilitation" before she will be granted discretionary relief such as cancellation of removal.

See *Matter of C-V-T-*, 22 I. & N. Dec. 7, 12 (BIA 1998); *Matter of Edwards*, 20 I. & N. Dec. 191, 196 (BIA 1990) (holding that rehabilitation is "a factor to be considered in the exercise of discretion"). Although not impossible, it is much more difficult for a noncitizen who remains in continuous custody to demonstrate rehabilitation than it is for one who has lived a law-abiding life in the community for a substantial period of time. See *Matter of Marin*, 16 I. & N. Dec. 581, 588 (BIA 1978) ("Dependent upon the nature of the offense and the circumstances of confinement, it may well be that a confined respondent will not be able to demonstrate rehabilitation.").

Accordingly, the distinction drawn by Congress with respect to bond eligibility reflects the increased prospects of success on an important front for noncitizens who have resettled into the community. Congress had every reason to draw a line between individuals who are taken into immigration custody "when * * * released" and those who are not: the logic of mandatory detention is at its apex where an individual's rehabilitation is doubtful and she has a weak case for relief on the merits. Broadening mandatory detention to apply regardless of rehabilitation appears arbitrary and does not necessarily serve the government's interests in identifying noncitizens who may reoffend or flee. See *Demore* v. *Kim*, 538 U.S. 510, 518-519 (2003).

III. The Government's Reading Would Raise Significant Doubts About The Constitutionality Of The Statute.

Conscious that it has prevailed against a facial challenge to the mandatory detention statute, the government advances a view of that statute that treats mandatory detention of noncitizens who have not been taken into immigration custody "when * * * released" as a form of punishment. Interpreting the statute to distinguish between noncitizens who have had a period of release and those who have not thus avoids serious constitutional concerns.

This Court has long recognized that immigration detention may not be used for penal purposes. See *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896) (holding that subjecting noncitizen to imprisonment at hard labor before deportation violated the Due Process Clause and the Sixth Amendment); *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("The [immigration] proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). And when this Court previously considered the constitutionality of Section 1226(c), the Court upheld the provision on the basis of its non-punitive purposes, *i.e.*, ensuring that noncitizens would appear for their removal hearings and protecting the community from dangerous criminals. See *Demore*, 538 U.S. at 518-519. Further, as Justice Kennedy recognized in his concurrence, those justifications are "premised upon the alien's deportability." *Id.* at 531 (Kennedy, J., concurring).

Those foundations grow shaky when applied to noncitizens who have lived lawfully in the community for a period of months or years. Because of the increased probability that they may ultimately obtain relief from removal, noncitizens who can demonstrate rehabilitation by showing a period of post-release law-abiding conduct have every incentive to appear for their removal hearings and litigate their claims for relief. Cf. *Zadvydas*, 533 U.S. at 690 (stating that the "justification" of "preventing flight" is "weak or non-existent where removal seems a remote possibility at best"). Further, even if Congress had good reasons to be concerned that noncitizens who are subject to criminal grounds of removability would reoffend before their immigration proceedings concluded, see *Demore*, 538 U.S. at 518, those reasons do not apply to noncitizens who have been living freely for months or years and have not, in fact, reoffended. See *Zadvydas*, 533 U.S. at 690-691 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."). Finally, noncitizens who have had a gap in custody are more likely to receive relief from removal; their ultimate likelihood of success is therefore much higher than it is for their counterparts who have been held in continuous custody.

Under those circumstances, imposing mandatory detention appears to have little purpose but to punish an individual on the basis of a crime for which she has already served her criminal sentence—an outcome that would be difficult or impossible to reconcile with the commands of the

Constitution. Congress may not attaint people, even noncitizens, and may not require the imposition of punishment without trial by jury and other constitutional protections. This Court should not adopt an interpretation that would throw Section 1226(c) into such constitutional doubt.

IV. The Government Understates Its Ability To Take Noncitizens Into Immigration Custody Promptly After Their Release From Criminal Custody.

The government contends that gaps in custody are "often caused by reasons outside [DHS's] control," and in particular by the refusal of state and local jurisdictions to assist immigration enforcement efforts. See Pet. Br. 26. In fact, the government has extraordinary resources to identify and detain potentially removable noncitizens held by federal, state, and local law enforcement agencies. To the extent that it fails to do so, that failure is largely attributable to the government's own actions.

1. a. ICE's Criminal Alien Program screens virtually all individuals booked into federal and state prisons and local jails to identify and prioritize potentially removable noncitizens. See generally Congressional Research Serv., *Interior Immigration Enforcement: Criminal Alien Programs* (Sept. 8, 2016) (*Interior Immigration Enforcement*), *available at* https://fas.org/sgp/crs/homesec/R44627.pdf. That screening takes place through several different mechanisms.

First, Criminal Alien Program officers use biometric information to identify potentially

removable noncitizens. *Interior Immigration Enforcement* at 10. When a law enforcement agency takes custody of an individual in relation to a criminal offense, the agency submits the arrestee's fingerprints to the FBI for a criminal background check. *Id.* at 11. Under an initiative known as Secure Communities, those fingerprints are automatically checked against DHS databases, which, as of June 10, 2015, included over 186 million unique records. *Id.* at 11 n.47.[7] Secure Communities has been in place in all 3,181 jurisdictions within the fifty states, the District of Columbia, and five U.S. territories since January 2013, thus ensuring that DHS is automatically notified whenever an individual is booked into criminal custody and automatically notified of any sentence meted out in ensuing criminal proceedings. See U.S. Immigration and Customs Enforcement, *Secure Communities*, https://www.ice.gov/secure-communities (accessed July 31, 2018).

Second, Criminal Alien Program officers interview arrestees and prisoners in person to

---

[7] Under the Obama administration, Secure Communities was replaced by a program known as the Priority Enforcement Program, which used the same automatic biometric database checks but limited the use of detainers, among other reforms. *See* U.S. Immigration and Customs Enforcement, *Priority Enforcement Program*, https://www.ice.gov/pep (accessed July 31, 2018). In January 2017, the current administration terminated the Priority Enforcement Program and restored Secure Communities. *See* Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

identify potentially removable noncitizens who do not have existing biometric records in DHS's databases. *Interior Immigration Enforcement* 10. As of April 2016, there were approximately 1300 Criminal Alien Program officers monitoring 100% of federal and state prisons. *Ibid.*

When Criminal Alien Program officers identify a potentially removable noncitizen in law enforcement custody, they may issue a detainer, which is a checkbox form asking the law enforcement agency to notify DHS at least 48 hours before the noncitizen is released and to maintain custody of the noncitizen for up to 48 hours after when he or she would otherwise be released. See U.S. Immigration and Customs Enforcement, *Detainer Policy*, https://www.ice.gov/detainer-policy (accessed July 31, 2018). The number of detainers increased dramatically over recent decades—from 5,246 in fiscal year 2003 to a peak of 309,697 in fiscal year 2011.[8] Those numbers declined under reforms implemented under the Obama administration's Priority Enforcement Program, with fewer than 100,000 detainers issuing in each of fiscal years 2015 and 2016. *Id.* The current administration rescinded those reforms, however, and ICE's use of detainers has again increased.[9]

---

[8] TRAC, *Latest Data: Immigration and Customs Enforcement Detainers*, *available at* http://trac.syr.edu/phptools/immigration/detain/ (accessed Aug. 2, 2018).

[9] TRAC, *Use of ICE Detainers: Obama v. Trump*, *available at* http://trac.syr.edu/immigration/reports/479/ (accessed Aug. 2, 2017).

b. An additional mechanism available to the government to ensure chain of custody is the Institutional Hearing Program. That program, which is effect in all state prison systems, allows removal proceedings to be conducted before an immigration judge at hearing sites within federal, state, and local correctional facilities. When a removable noncitizen completes his sentence, he is released into DHS custody for immediate removal, thus "eliminating the need for ICE to detain the alien[] prior to removal."[10]

2. Despite the extensive resources available to the government to enable it to take noncitizens into custody promptly, the government nonetheless contends that its failure to do so is due to States' and localities' alleged noncompliance with detainer requests. See Pet. Br. 26-27; Pet. 13. That contention is not borne out by the data.

As an initial matter, the percentage of federal requests for notification or detainer that are refused by state and local law enforcement agencies is low. Based on ICE's own records, from fiscal year 2014 through the first two months of fiscal year 2016, only

---

[10] U.S. Immigration and Customs Enforcement, *Institutional Removal Program National Workload Study*, at 1 (Sept. 2004), *available at* https://cis.org/sites/cis.org/files/articles/2009/fentress-report.pdf; see U.S. Department of Justice Office of the Inspector General, *Audit Report: Immigration and Naturalization Service Institutional Removal Program*, at i (Sept. 2002), *available at* https://oig.justice.gov/reports/INS/a0241/final.pdf; see also *Demore*, 538 U.S. at 530 n.14.

6.1% of detainer requests were refused.[11] Nonetheless, in a full 55.5% of instances in which it issued a detainer request during the same period, ICE failed to take custody of the noncitizen. *Id.* Thus, gaps in custody more often result from the government's own unexplained failure to detain noncitizens promptly than from state and local jurisdictions' refusal to cooperate. And despite well publicized disagreements between federal and some state or local authorities regarding immigration enforcement in recent years, the percentage of detainer requests that are refused has remained at a consistently low level. From February 2017 through April 2018, ICE recorded only 5.6% of detainer requests as being refused.[12]

Further, the ICE statistics on which the government relies overstate state and local refusals to cooperate. See Pet. Br. 26. Those statistics do not distinguish between requests to notify ICE in advance of a noncitizen's release and requests to detain the noncitizen for 48 hours after the local sentence is complete. Many jurisdictions that decline to detain noncitizens beyond their release

---

[11] See TRAC, *Has Cooperation by State and Local Law Enforcement Agencies Improved ICE's Apprehension Numbers?*, tbl. 1, *available at* http://trac.syr.edu/immigration/reports/433/ (accessed July 31, 2018). TRAC notes that these numbers are based on field data, and therefore may suffer from inaccuracies in ICE's recording of refusals. Nonetheless, they represent the best data available.

[12] TRAC, *Latest Data: Immigration and Customs Enforcement Detainers*, *available at* http://trac.syr.edu/phptools/immigration/detain/ (accessed Aug. 3, 2018).

date nonetheless continue to notify ICE 48 hours in advance of the noncitizen's release from custody. For example, under California's SB 54, which came into effect in January 2018, certain California law enforcement agencies may no longer detain individuals on the basis of an immigration detainer request, but may continue to notify ICE of release dates and may facilitate transfers of certain classes of individuals who have been arrested for or convicted of specified offenses including serious, violent, and state prison felonies. See Immigrant Legal Resource Center, *Practice Advisory: SB 54 and the California Values Act*, at 3 (Feb. 2018), *available at* https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf; Cal. Gov't Code § 7285.5 (a)(1)-(3).[13]

Finally, when state and local jurisdictions refuse to honor detainer requests, it is often because they are concerned about liability arising from procedural shortcuts that the federal government has elected to take in issuing such requests. From 1997 through 2012, ICE's standard detainer form, I-247, permitted ICE agents to request that local jurisdictions detain noncitizens after local detention authority lapsed based solely on ICE's assertion that "[i]nvestigation has been initiated to determine whether this person

---

[13] Notably, the limited restrictions in SB 54 do not apply to the state prison system. See Cal. Gov't Code § 7284.4 (defining "California law enforcement agency," to which the Act's restrictions apply, not to include "the Department of Corrections and Rehabilitation").

is subject to removal from the United States."[14] Several courts held that issuing a detention request based solely on the initiation of an investigation, without a determination of probable cause, exceeded ICE's authority under the INA, see *Moreno* v. *Napolitano*, 213 F. Supp. 3d 999, 1008 (N.D. Ill. 2016), and that the receiving jurisdiction's execution of such a request violated the Fourth Amendment, see *Morales* v. *Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015); *Miranda-Olivares* v. *Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014). Local law enforcement authorities thus face liability for complying with those legally flawed detainer requests. See, *e.g.*, *Miranda-Olivares*, 2014 WL 1414305, at *12.

---

[14] A version of Form I-247 containing this language was issued on April 1, 1997. See National Immigration Project of the National Lawyers Guild, *Understanding Immigration Detainers: An Overview for State Defense Counsel* at Appendix B (Mar. 2011), *available at* https://nationalimmigrationproject.org/pdfs/practitioners/practice_advisories/crim/2011_may_understand-detainers.pdf. DHS revised Form I-247 in August 2010 and December 2011, but the revised forms retained essentially the same language. *See id.*; Mem. of Law in Support of Plaintiffs/Petitioners' Amended Motion for Class Certification or Representative Habeas Action, Ex. B, *Jimenez Moreno* v. *Napolitano*, No. 11-cv-05452 (N.D. Ill. June 21, 2013), ECF No. 95-3. DHS revised Form I-247 yet again in December 2012, this time allowing ICE to issue a detainer based on its "[d]etermin[ation] that there is reason to believe the individual is an alien subject to removal from the United States." U.S. Immigration and Customs Enforcement, *Immigration Detainer—Notice of Action* (Rev. 12/12), *available at* https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

Versions of I-247 that have been in effect since May 2015 require ICE itself to determine that "[p]robable cause exists that the subject is a removable alien." DHS Form I-247D (Rev. 5/15), *available at* https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF. In March 2017, DHS issued a new policy directing that detainer requests be accompanied by an administrative warrant issued by an authorized immigration officer. See U.S. Immigration and Customs Enforcement, *Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers* § 2.4 (Mar. 24, 2017), *available at* https://www.ice.gov/sites/default/files/ documents/Document/2017/10074-2.pdf.[15] Even with that reform in place, state and local jurisdictions detaining individuals on the basis of immigration detainers may continue to face liability in suits brought under Section 1983 alleging that complying with the federal government's requests violates the Fourth Amendment. For example, in November 2017, an Indiana county entered a Stipulated Judgment providing that its compliance with ICE

---

[15] ICE previously engaged in a practice of issuing detainers based solely on an individual's foreign birth and the absence of records relating to that individual in an immigration database. A court recently held that those facts fail to establish probable cause to detain the individual. See *Roy* v. *County of Los Angeles*, No. CV 12-09012, 2018 WL 914773, at *20 (C.D. Cal. Feb. 7, 2018), *reconsideration denied*, No. CV-12-09012, 2018 WL 3439168 (C.D. Cal. July 11, 2018). The court further held that ICE's practice of issuing warrantless detainer requests without making an individualized determination of flight risk exceeded its authority under the INA. *Id.* at *20-21.

detainers without probable cause sufficient under the criminal law constituted a Fourth Amendment violation. See *Lopez-Aguilar* v. *Marion Cty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 963 (S.D. Ind. 2017). Similarly, a district court in California has held that the Fourth Amendment does not permit local authorities to hold individuals beyond their release dates on the basis of civil immigration detainers. See Order Granting Plaintiffs' Motion to Modify Class Definition, *Roy* v. *County of Los Angeles*, No. CV 12-09012, Slip Op. at 6, ECF No. 396 (C.D. Cal. July 11, 2018).

In sum, the government's incorrect interpretation of Section 1226(c) cannot be justified on the ground that the government is simply unable to take individuals into custody, as a practical matter, "when" those individuals are "released" from imprisonment for criminal offenses. 8 U.S.C. 1226(c)(1). The government has tremendous resources for identifying, tracking, and apprehending potentially removable noncitizens, and it cannot lay the blame for its failure to do so at the feet of States and localities.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

August 10, 2018 Respectfully submitted,

ELAINE J. GOLDENBERG
Counsel of Record
CELIA R. CHOY
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W.
Seventh Floor
Washington, DC 20004-1357
(202) 220-1100
Elaine.Goldenberg@mto.com
Celia.Choy@mto.com

CHARLES G. ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street
Suite 1300
Chicago, IL 60601
(312) 660-1613
croth@heartlandalliance.org